No. 03-8661

| | |
|---|---|
| Title: | Melvin T. Smith, Petitioner |
| | v. |
| | Massachusetts |
| Docketed: | February 2, 2004 |
| Lower Ct: | Appeals Court of Massachusetts |
| Case Nos.: | (00-P-1215) |
| Decision Date: | May 21, 2003 |
| Discretionary Court Decision Date: | October 3, 2003 |
| Questions Presented | |

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Dec 31 2003 | Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 3, 2004) |
| Feb 19 2004 | Waiver of right of respondent Massachusetts to respond filed. |
| Mar 4 2004 | DISTRIBUTED for Conference of March 19, 2004. |
| Mar 12 2004 | Response Requested . (Due April 12, 2004) |
| Apr 14 2004 | Order further extending time to file response to petition to and including May 12, 2004. |
| May 12 2004 | Brief of respondent Massachusetts in opposition filed. (PRINTED BRIEF) |
| May 26 2004 | DISTRIBUTED for Conference of June 10, 2004. |
| Jun 4 2004 | Reply of petitioner Melvin T. Smith filed. |
| Jun 14 2004 | Motion of petitioner for leave to proceed in forma pauperis and petition for a writ of certiorari GRANTED. |
| Jul 13 2004 | Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 27, 2004. |
| Aug 24 2004 | Further extension of time within which to file the joint appendix and petitioner's brief on the merits to and including September 10, 2004. |
| Sep 10 2004 | Joint appendix filed. |
| Sep 10 2004 | Brief of petitioner Melvin T. Smith filed. |
| Sep 10 2004 | Brief amicus curiae of National Association of Criminal Defense Lawyers filed. |
| Sep 22 2004 | Extension of time within which to file respondent's brief on the merits to and including November 1, 2004. |
| Sep 29 2004 | SET FOR ARGUMENT ON Wednesday, December 1, 2004. |
| Sep 30 2004 | CIRCULATED. |
| Oct 29 2004 | Brief amici curiae of Idaho, et al. filed. (Distributed) |
| Nov 1 2004 | Brief amicus curiae of United States filed. (Distributed) |
| Nov 1 2004 | Brief of respondent Massachusetts filed. (Distributed) |
| Nov 1 2004 | Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed) |
| Nov 9 2004 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Nov 10 2004 | Record received from Appeals Court of Massachusetts. (1 box) |
| Nov 15 2004 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |

| | |
|---|---|
| Nov 22 2004 | Reply of petitioner Melvin T. Smith filed. (Distributed) |
| Dec 1 2004 | Argued. For petitioner: David J. Nathanson, Boston, Mass. For respondent: Cathryn A. Neaves, Assistant Attorney General, Boston, Mass.; and on behalf of the United States, as amicus curiae, Sri Srinivasan, Assistant to the Solicitor General, Department of Justice, Washington, D.C. |

(5)

No. _____

# In the

# Supreme Court of the United States

Melvin T. Smith,

*petitioner*

v.

Commonwealth of Massachusetts,

*respondent*

**Petition for Writ of Certiorari**
**to the Appeals Court of the Commonwealth of Massachusetts**


Counsel of Record for Petitioner:

David Nathanson
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108
617-988-8309
dnathanson@publiccounsel.net

## Questions Presented

1. Should this Court grant certiorari to directly review Smith's case and decide the question that, constrained by the habeas corpus standard of review, it did not reach in the recent case of Price v. Vincent?[1] That is, whether the double jeopardy clause's prohibition against successive prosecutions is violated where the judge unequivocally rules that the defendant is not guilty because the government's evidence is insufficient but later reverses her finding of not guilty?

2. There is a split of opinion among the United States Courts of Appeals and among the state courts on the question of whether, in similar situations, trial judges violate the double jeopardy protection against successive prosecution by withdrawing an already-granted verdict of not guilty. Should this Court grant certiorari to clarify its jurisprudence?

[1] Price v. Vincent, 538 U.S. 634, 123 S. Ct. 1848, 1854-55, 155 L. Ed. 2d 877 (2003).

## TABLE OF CONTENTS


| | Page |
|---|---|
| **Questions presented for review** | i |
| **Table of contents** | ii |
| **Table of authorities** | iii |
| **Citations to the opinions below** | vi |
| **Statement of jurisdiction** | vii |
| **Constitutional and statutory provisions involved in this case** | vii |
| **Concise statement of the case** | 1 |
| **Reasons for granting the writ** | 4 |
| I. **The trial court withdrew its acquittal of Smith on the firearms charge only after he presented his case and requested jury instructions. But the Constitution grants Smith protection against being prosecuted for a crime where a competent tribunal previously acquitted him of that crime. Smith's conviction cannot stand** | 4 |
| II. **This Court's jurisprudence sets clear guideposts for consideration of double jeopardy claims where an acquittal is reversed by the trial judge. But the decisions of state courts as well as federal courts have significantly muddied the waters, employing divergent analyses and reaching divergent results. This Court must resolve the conflict between the lower courts** | 7 |
| **Conclusion** | 9 |




## INDEX TO APPENDICES


**APPENDIX A:** Commonwealth v. Smith, 58 Mass. App. Ct. 166 (2003) ..... App. 1a

**APPENDIX B:** Commonwealth v. Smith, Mass. Super. Ct. No. SUCR1998-11521 (November 12, 13, 16 and 18, 1998) (Rulings on Motion for Required Finding of Not Guilty) ..... App. 10a

**APPENDIX C:** Commonwealth v. Smith, Mass. Super. Ct. No. SUCR1998-11521 (June 25, 2001) (Ruling on Motion for a New Trial) ..... App. 13a

**APPENDIX D:** Commonwealth v. Smith, 440 Mass. 1104 (2003) ... App. 23a

## Table Of Authorities


Page

**Cases**

Arizona v. Rumsey, 467 U.S. 203 (1984) . . . . . 6

Barnes v. State, 9 S.W.3d 646 (Mo. Ct. App. 1999) . . . . . 8

Brooks v. State, 827 S.W.2d 119 (Ark. 1992) . . . . . 8

Caldwell v. State, 803 So.2d 839 (Fla. Dist. Ct. App. 2001) . . . . . 8

Fong Foo v. United States, 369 U.S. 141 (1962) . . . . . 7

Herring v. New York, 422 U.S. 853, 862 (1975) . . . . . 8

In the Matter of Lionel F., 558 N.E.2d 30 (N.Y.), cert. denied, 498 U.S. 923 (1990) . . . . . 9

Lowe v. State, 744 P.2d 856 (Kan. 1987) . . . . . 8

Marbury v. Madison, 5 U.S. 137 (1803) . . . . . 9

Penn v. State, 945 S.W.2d 397 (Ark. Ct. App. 1997) . . . . . 8

People v. Henry, 769 N.E.2d 34 (Ill. App. Ct. 2001) . . . . . 8

People v. Strong, 472 N.E.2d 1152 (Ill. App. Ct. 1984) . . . . . 8

Price v. Vincent, 538 U.S. 634, 123 S. Ct. 1848, 155 L. Ed. 2d 877 (2003) . . . . . 4-5, 7-8

Smalis v. Pennsylvania, 476 U.S. 140 (1986) . . . . . 5-8

United States v. Baggett, 251 F.3d 1087 (6th Cir. 2001), cert. denied, 534 U.S. 1167 (2002) . . . . . 6, 8

United States v. Blount, 34 F.3d 865 (9th Cir. 1994) . . . . . 8

United States v. Byrne, 203 F.3d 671 (9th Cir. 2001) . . . . . 8

United States v. LoRusso, 695 F.2d 45, cert. denied sub nom Errante v. United States, 460 U.S. 1070 (1983) . . . . . 6

United States v. Martin Linen, 430 U.S. 564 (1977) . . . . . 5-6

United States v. Rahman, 189 F.3d 88 (2nd Cir. 1998), cert. denied, 528 U.S. 1094 (2000) . . . . . 8

United States v. Washington, 48 F.3d 73 (2d Cir. 1995), cert. denied, 515 U.S. 1151 (1995) . . . . . 8

United States v. Wilson, 420 U.S. 332 (1975) . . . . . 7

State v. Blacknall, 672 A.2d 1170 (N.J. Super. App. Div. 1995) . . . . 8

State v. Jovino, 524 A.2d 556 (R.I. 1987) . . . . . 9

State v. Millanes, 885 P.2d 106 (Ariz. Ct. App. 1994) . . . . . 8

State v. Sperry, 945 P.2d 546 (Or. Ct. App. 1997) . . . . . 8

**Constitutional Provisions**

U.S. Const. Art. V . . . . . passim

**Statutory Provisions**

28 U.S.C. §1257(a) . . . . . vi

28 U.S.C. § 2254 . . . . . 4

**Court Rules**

Mass. R. Crim. P. 25 . . . . . 1

**Miscellaneous**

http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-524.pdf (visited December 29, 2003) . . . . . 6, 9

No. _____

**In the**

**Supreme Court of the United States**

Melvin T. Smith,

*petitioner*

v.

Commonwealth of Massachusetts,

*respondent*

**Petition for Writ of Certiorari**
**to the Appeals Court of the Commonwealth of Massachusetts**

Petitioner Melvin Smith respectfully prays that a writ of certiorari issue to review the judgment of the Massachusetts Supreme Judicial Court.

**Citations to the Opinions Below**

The opinion of the Massachusetts Superior Court granting and then denying Smith's motion for a required finding of not guilty is unpublished. The opinion of the Massachusetts Superior Court denying Smith's motion for a new trial is unpublished. The opinion of the Massachusetts Appeals Court affirming Smith's conviction of unlawful possession of a firearm over double jeopardy and vagueness challenges is reported as Commonwealth v. Smith, 58 Mass. App. Ct. 166, 788 N.E.2d 977 (2003). The order of the Massachusetts Supreme Judicial Court denying further appellate review is published at Commonwealth v. Smith, 440 Mass. 1104, 797 N.E.2d 380 (2003). Copies of the opinions below appear in the appendix to the this petition at App. 1a-23a.



**Statement of Jurisdiction**

The Massachusetts Supreme Judicial Court issued its order denying review of Smith's conviction on October 3, 2003. Neither party petitioned that court for a rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

**Constitutional and Statutory Provisions Involved In This Case**

1. The Fifth Amendment to the United States Constitution provides:

> No person shall held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

2. Massachusetts General Laws, Chapter 269, § 10 provides, in part:

> (a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:
>
> (1) being present in or on his residence or place of business; or
>
> (2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
>
> (3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or
>
> (4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or
>
> . . . shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than one year nor more than two and one-half years in a jail or house of correction. . . .
>
> (b) Whoever, except as provided by law, carries on his person, or carries on his person or under his control in a vehicle, any stiletto, dagger, [etc.] . . . shall be punished. . . .

(c) Whoever, except as provided by law, possesses a machine gun . . . without permission under section one hundred and thirty-one of said chapter one hundred and forty . . . shall be punished by imprisonment in the state prison for life, or for any term of years. . . .

(d) Whoever, after having been convicted of any of the offenses set forth in paragraph (a), (b) or (c) commits a like offense or any other of the said offenses, shall be punished by imprisonment in the state prison for not less than five years nor more than seven years; for a third such offense, by imprisonment in the state prison for not less than seven years nor more than ten years; and for a fourth such offense, by imprisonment in the state prison for not less than ten years nor more than fifteen years. The sentence imposed upon a person, who after a conviction of an offense under paragraph (a), (b) or (c) commits the same or a like offense, shall not be suspended, nor shall any p rson so sentenced be eligible for probation or receive any deduction from his sentence for good conduct.

4. Massachusetts Rule of Criminal Procedure 25 provides, in part:
Motion For Required Finding Of Not Guilty
(a) Entry by Court. The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, it shall be ruled upon at that time. If the motion is denied or allowed only in part by the judge, the defendant may offer evidence in his defense without having reserved that right.



## Concise Statement of the Case

Petitioner Melvin Smith was charged with unlawful possession of a firearm (fourth offense), assault and battery with a dangerous weapon, and armed assault with intent to murder. On November 12, 1998, a Justice Elizabeth Donovan of the Massachusetts Superior Court allowed Smith's motion for a required finding of not guilty[2] of the charge of unlawful possession of a firearm.[3] Smith's counsel successfully argued that the government failed to introduce any evidence as to the whether the firearm met the Massachusetts statute's requirement that the barrel length be shorter than sixteen inches.[4] Finding that the government produced "not scintilla of evidence" as to barrel length, the court entered a required finding of not guilty.[5] The finding was not communicated to the jury, but it was recorded on the docket.[6] Specifically, the court endorsed the motion for a required finding of not guilty as follows:[7]

11/12/98 - Filed and after hearing.
Allowed
Donovan, J
Attest: Elizabeth Brady
Assistant Clerk

The court immediately denied the prosecutor's motion to reopen the evidence.[8] After the required finding of not guilty entered as to the firearm charge, Smith and co-defendant Brown presented their cases, rested, and argued for their requested jury

---

[2] Mass. R. Crim. P. 25(a).
[3] The transcript of the trial will be cited, by volume and page, as "(Tr. [volume]:[page])."; (Tr. 6:67).
[4] (Tr. 6:62-65); M.G.L. c. 269, § 10(a); M.G.L. c. 140, § 121.
[5] (Tr. 6:65).
[6] App. 3a.
[7] App. 10a.

instructions.[9] *After* those further substantive proceedings, the court reversed the finding of not guilty.[10] Upon learning that the court had "reinstated" the firearm indictment, Smith's counsel attempted to argue additional grounds in support of the motion but the court refused to hear further argument.[11]

At the close of jury deliberations, Smith was convicted of unlawful possession of a firearm, assault and battery with a dangerous weapon and armed assault with intent to murder.[12] The jury acquitted Smith's codefendant, Felicia Brown, of being an accessory after the fact.[13]

Immediately following the jury's verdict the court proceeded to a jury-waived trial on that portion of the firearm indictment that charged Smith with a fourth offense.[14] After that trial, Smith was convicted of a fourth offense of unlawful possession of a firearm.[15] Smith was then sentenced to concurrent terms of ten to twelve years on the firearm indictment, nine to ten years on the assault and battery by means of a dangerous weapon indictment, and twelve to fifteen years on the assault with intent to murder indictment.[16] He appealed.

Smith then filed a motion for a new trial in the Superior Court, claiming that the withdrawal of the finding of not guilty subjected him to successive prosecutions. In its memorandum denying the motion for a new trial, the trial court expressly found that "the court allowed Smith's motion for a required

[8] (Tr. 6:66-67).
[9] (Tr. 6:67-104, 106-119).
[10] (Tr. 6:119-24).
[11] (Tr. 6:124-25).
[12] (Tr. 8:13-16).
[13] (Tr. 8:16).
[14] (Tr. 8:17, 19-24).
[15] (Tr. 8:83), M.G.L. c. 269, § 10 (d).
[16] (Tr. 8:96).



finding of not guilty on the firearms charge" and only withdrew the allowance *after* Smith rested his case.[17] But the trial court denied relief, ruling that the withdrawal of the finding of not guilty did not violate double jeopardy only because "Smith was convicted by the same jury that first heard the evidence against him, and no second jury was needed."[18] Smith appealed.

The Massachusetts Appeals Court denied Smith's appeal in Commonwealth v. Smith.[19] The Commonwealth argued that the ruling was interlocutory and reconsideration was permissible. But, like the trial court, the Appeals Court rested its decision solely on the ground: that "double jeopardy protections were not violated in these circumstances because the judge's correction of her ruling did not require a second proceeding" nor did it "'subject[] him to a second trial before a second trier of fact.'"[20]

State proceedings ended on October 3, 2003 when the Massachusetts Supreme Judicial Court denied Smith's application for leave to obtain further appellate review.[21]

[17] App. 17a.
[18] App. 20a.
[19] App 1a-9a.
[20] App. 3a (quoting United States v. Wilson, 420 U.S. 332, 345 (1975)).
[21] App. 23a.

## Reasons for Granting the Petition

**I. The trial court withdrew its acquittal of Smith on the firearms charge after he presented his case and requested jury instructions. But the Constitution grants Smith protection against being prosecuted for a crime where a competent tribunal previously acquitted him of that crime. Smith's conviction cannot stand.**

A. Smith's case is well-suited for certiorari review.

Hard cases, and particularly hard facts, make bad law. Those kinds of cases do not suit this Court's function of clearly declaring the fundamental law of this nation. That is precisely what prevented this Court from deciding in May, 2003 the double jeopardy issue presented here. At that time, the Court considered the more factually and procedurally complicated case of Price v. Vincent.[22] On the other hand, Smith's case is particularly well-suited for certiorari review.

The facts complicated Vincent because the trial court's ruling directing a verdict for the defendant was tentative[23] and because no other proceedings occurred before the court reconsidered its ruling.[24] The habeas corpus standard of review[25] complicated Vincent because the defendant had to show that the state court's rejection of his claim was not only wrong on the merits but also objectively unreasonable.[26]

Smith's case uncomplicatedly presents the issue that evaded the Court in Vincent. Factually, the Massachusetts courts all agreed that the trial court in fact granted Smith's motion for a required finding of not guilty.[27] And there is no

[22] Price v. Vincent, 538 U.S. 634, 123 S. Ct. 1848, 1854-55, 155 L. Ed. 2d 877 (2003).
[23] Vincent, 123 S. Ct. at 1854.
[24] Vincent, 123 S. Ct. at 1851.
[25] 28 U.S.C. § 2254(d)(1).
[26] Vincent, 123 S. Ct. at 1854-55.
[27] App. 2a, 20a.



dispute that the trial court withdrew the finding of not guilty only after Smith presented his case, rested, and argued his requests for jury instructions.[28] Procedurally, this Court would be unconstrained by the habeas corpus standard of review. It would be free to declare what the Constitution requires, rather than struggling with the question of whether other courts were unreasonably wrong. Thus, this Court is well-positioned to rule whether the double jeopardy clause permits a trial judge to withdraw a finding of not guilty solely because the jury remained intact to hear evidence against the defendant on other charges.

B. The trial court violated Smith's right not to be placed in jeopardy twice.

Jeopardy terminated as to the firearm indictment when the court allowed Smith's motion for a required finding of not guilty; further proceedings violated the prohibition against double jeopardy.[29] But the Massachusetts Appeals Court ruled that the Constitution was not violated because "the judge's correction of her ruling did not require a second proceeding" before a second trier of fact.[30] That is, the judge's finding of not guilty meant nothing for purposes of double jeopardy because the jury remained in the box. When this view was advanced by the United States as *amicus curiae* in Vincent, at least one Justice of this Court characterized the argument as "extraordinary."[31]

Indeed, one would have thought that this Court's decisions in United States v. Martin Linen and Smalis v. Pennsylvania settled the matter. In Martin

[28] App. 2a, 17a.
[29] United States v. Martin Linen, 430 U.S. 564, 571 (1977); Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986).
[30] App. 3a.

Linen, this Court declared that there is "no 'legal distinction' between judge and jury with respect to the invocation of the protections of the Double Jeopardy Clause."[32] Thus, the judge's reconsideration of her acquittal of Smith was just as impermissible as "reconsideration" of a jury's acquittal. If the matter needed to be any clearer, Smalis holds that "*whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause.*"[33] Here, the trial judge unquestionably acquitted Smith. That acquittal is no less final, no less determinative of the issues than a jury's verdict.[34]

Nevertheless and quite unfortunately, the Massachusetts courts, some federal Courts of Appeals, and some state courts have now muddied the waters. But the cases relied upon by the Massachusetts courts (and other courts) all derive from United States v. LoRusso.[35] A proper reading of LoRusso shows that it does not even support the Massachusetts Appeals Court's position. There, no double jeopardy violation occurred because the government was allowed to proceed on a lesser included offense after the motion for acquittal had been allowed only on the primary offense.[36] This unremarkable procedure is fundamentally different than reconsidering the acquittal on the primary offense.[37]

[31] http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-524.pdf at 25 (visited December 29, 2003).
[32] Martin Linen, 430 U.S. at 573.
[33] Smalis, 476 U.S. at 145 (emphasis added).
[34] Arizona v. Rumsey, 467 U.S. 203, 210-212 (1984).
[35] United States v. LoRusso, 695 F.2d 45, cert. denied sub nom Errante v. United States, 460 U.S. 1070 (1983).
[36] LoRusso, 695 F.2d at 52.
[37] United States v. Baggett, 251 F.3d 1087, 1098 (6th Cir. 2001) (Aldrich, J. dissenting).



The Massachusetts Appeals Court[38] and the United States in Vincent went wrong by mangling this Court's holding in United States v. Wilson.[39] Wilson holds that double jeopardy is not violated by a government appeal after a jury convicts the defendant but the judge later orders an acquittal.[40] But where the first factual resolution of the case resulted in acquittal, then jeopardy has terminated and further proceedings of any type are barred.[41] Here, Smith was first acquitted and then unconstitutionally subjected to further factfinding resulting in conviction.

Finally, although prejudice is irrelevant to double jeopardy claims, the withdrawal of Smith's acquittal after the close of evidence and after the charge conference,[42] deprived Smith of important advocative opportunities. He lost the opportunity to argue additional grounds for his motion for a required finding of not guilty as well as the opportunity to argue requests for jury instructions regarding the firearms charge.[43]

## II. This Court's jurisprudence sets clear guideposts for consideration of double jeopardy claims where an acquittal is reversed by the trial judge. But the decisions of state courts as well as federal courts have significantly muddied the waters, employing divergent analyses and reaching divergent results. This Court must resolve the conflict between the lower courts.

The Court well knows that the lower courts take numerous inconsistent positions on the issue at the bar. The matter was fully briefed but not reached in

[38] App. 3a.
[39] United States v. Wilson, 420 U.S. 332 (1975).
[40] Wilson, 420 U.S. at 344-45 (1975).
[41] Fong Foo v. United States, 369 U.S. 141 (1962); Smalis, 476 U.S. 140, 145 (1986).
[42] (Tr. 6:119).
[43] Herring v. New York, 422 U.S. 853, 862 (1975).

Vincent.[44] Nevertheless, Smith will briefly recapitulate the split among the courts. Those courts that find a double jeopardy violation generally focus on the fact that, after the grant of the acquittal, there were further proceedings before the acquittal was withdrawn.[45] Others focus on the fact that the trial court's order was final rather than tentative.[46]

Those courts that reject the double jeopardy claim generally find no violation because no further substantive proceedings ensued before the acquittal was withdrawn.[47] Others rest on a holding that the ruling on the directed verdict was only tentative or was unclear.[48] The remarkable position accepted by the Massachusetts Appeals Court, if allowed to stand is fundamentally at war with this Court's decision in Smalis. To Smith's knowledge, only two other courts have accepted this massively flawed view.[49]

This Court must grant certiorari to resolve the wide disparity of authority interpreting the meaning of the prohibition against double jeopardy. Unfortunately, the Court's decision in Vincent did not resolve the "tremendous amount of uncertainty" in the lower courts because the Vincent Court could only

[44] See Vincent, 123 S. Ct. at 1854 n.2.
[45] See United States v. Blount, 34 F.3d 865, 868-869 (9th Cir. 1994); State v. Millanes, 885 P.2d 106, 109-111 (Ariz. Ct. App. 1994); Brooks v. State, 827 S.W.2d 119, 121-123 (Ark. 1992); Penn v. State, 945 S.W.2d 397 (Ark. Ct. App. 1997); Caldwell v. State, 803 So.2d 839, 841 (Fla. Dist. Ct. App. 2001); People v. Strong, 472 N.E.2d 1152 (Ill. App. Ct. 1984); People v. Henry, 769 N.E.2d 34, 41-44 (Ill. App. Ct. 2001); Lowe v. State, 744 P.2d 856, 856-858 (Kan. 1987); Barnes v. State, 9 S.W.3d 646, 647-651 (Mo. Ct. App. 1999); State v. Blacknall, 672 A.2d 1170, 1173-76 (N.J. Super. App. Div. 1995).
[46] Blount, 34 F.3d at 868-869.
[47] State v. Sperry, 945 P.2d 546, 552 (Or. Ct. App. 1997); United States v. Washington, 48 F.3d 73, 79 (2d Cir. 1995), cert. denied, 515 U.S. 1151 (1995); United States v. Rahman, 189 F.3d 88, 133 (2nd Cir. 1998), cert. denied, 528 U.S. 1094 (2000); United States v. Byrne, 203 F.3d 671, 671 (9th Cir. 2001).
[48] United States v. Byrne, 203 F.3d 671, 674 (9th Cir. 2001); United States v. Baggett, 251 F.3d 1087, 1094 (6th Cir. 2001), cert. denied, 534 U.S. 1167 (2002).



declare whether the decision below was unreasonably wrong.[50] But it is emphatically this Court's role "to say what the law is."[51] Where, as here, this Court is free to do so, the writ must issue.

**Conclusion**

This Court should grant the defendant's petition for a writ of certiorari.

Respectfully submitted,

David Nathanson
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108
617-988-8309
dnathanson@publiccounsel.net

Date: December 31, 2003

[49] State v. Iovino, 524 A.2d 556, 557-560 (R.I. 1987); In the Matter of Lionel F., 558 N.E.2d 30 (N.Y.), cert. denied, 498 U.S. 923 (1990),
[50] http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-524.pdf at 20 (visited December 29, 2003).
[51] Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803)

**COMMONWEALTH vs. MELVIN T. SMITH.**

**No. 00-P-1215**

**APPEALS COURT OF MASSACHUSETTS**

***58 Mass. App. Ct. 166; 788 N.E.2d 977; 2003 Mass. App. LEXIS 578***

**October 16, 2002, Argued**

**May 21, 2003, Decided**

**SUBSEQUENT HISTORY:**
[***1] As Corrected July 10, 2003.

**PRIOR HISTORY:**
Suffolk. Indictments found and returned in the Superior Court Department on September 26, 1996, and October 8, 1998. The cases were tried before Elizabeth B. Donovan, J., and a motion for a new trial, filed on February 14, 2001, was heard by her.

**DISPOSITION:**
Judgments affirmed; order denying motion for a new trial affirmed.

**COUNSEL:**
David J. Nathanson, Committee for Public Counsel Services, for the defendant.

Joseph M. Ditkoff, Assistant District Attorney, for the Commonwealth.

**JUDGES:**
Present: Cypher, Smith, & Grasso, JJ.

**OPINIONBY:**
CYPHER

**OPINION:**

[**980] [*167] CYPHER, J. The defendant, Melvin T. Smith, appeals from his convictions for assault with intent to murder, *G. L. c. 265, § 18*, assault and battery by means of a dangerous weapon, *G. L. c. 265, § 15A*, and unlawful possession of a firearm, fourth offense, *G. L. c. 269, § 10*. The defendant also appeals from the denial of his motion for a new trial.

1. Factual background. A jury could have found the following facts. Codefendant Felicia Brown lived with her mother, stepfather, and two siblings in a three-story building at 33 Lawn Street, in the Jamaica Plain section of Boston. n1 The [***2] Brown family occupied part of the second floor of the building and all of [*168] the third floor, and rented part of the second floor and all of the first floor to tenants. n2

n1 Brown was indicted on charges of being an accessory after the fact and perjury. The perjury indictment was severed. Brown was tried with the defendant on the accessory after the fact indictment and was acquitted. Following a separate trial, Brown was convicted on the perjury charge; the conviction was later reversed by this court. *Commonwealth v. Brown, 55 Mass. App. Ct. 440, 771 N.E.2d 214 (2002)*.

n2 Patrick Veridieu lived in the first floor apartment and Elaine Shaw lived in the second floor apartment.





On August 15, 1996, Christopher Robinson, Brown's cousin, spent the day sitting around the house, drinking alcohol, and [**981] smoking marijuana and crack cocaine. At approximately 4:00 A.M., Robinson went from the third floor to the second floor downstairs to lie down. When he reached the bottom of the stairs, he saw [***3] Brown and the defendant in Brown's bedroom. The defendant was holding what appeared to be a .32 or .38 caliber pistol.

Robinson testified that as he descended from the third to the second floor, the defendant shot him three times. The defendant said to Brown, "let's go." Robinson said, "I know who you are, Melvin. Why you shoot me? Why you shoot me? I know who you are. Your name is Melvin." n3

n3 Immediately after the shooting, Robinson told the police that he did not know Melvin's last name. At trial, however, Robinson testified that Brown had said, "His last name is Smith," as she left the house.

Brown and the defendant left the house. Robinson sought help from Brown's stepfather, who telephoned the police. The police and paramedics arrived within moments of each other.

While the paramedics attended to Robinson, Boston police Officer Wayne Clark asked Robinson who shot him. Robinson replied, "Melvin." Officer Clark asked for a last name, but Robinson said he did not know it. Officer Clark asked Robinson [***4] how he knew Melvin, and Robinson told him that Melvin was his cousin's boyfriend.

The shooting severely injured Robinson and destroyed his digestive tract. While in the hospital, Robinson selected a photograph of the defendant from a photographic array and identified the defendant as the person who shot him. At trial, Robinson identified the defendant as his assailant.

On August 25, 1996, Boston police Detective Tony Smith interviewed Brown in the presence of her mother. Brown said that she and the defendant had left because Robinson had been [*169] acting crazy and "busting up" the house. Brown told Detective Smith that at the time of the shooting, the defendant was in his car and that she had just approached the house. She said that she heard the gunshots as she walked to the door, and that she and the defendant drove away, to "Tony's." Brown cried during the interview and explained that she was under a lot of pressure. She said that she and the defendant went to a friend's house to use the phone.

The theory of the defense was that Robinson was too intoxicated by drugs and alcohol to correctly identify his assailant and that one of the tenants in the building, Patrick Veridieu, had a [***5] motive and an opportunity to shoot him.

2. Discussion. a. The motion for required finding of not guilty and double jeopardy. After the Commonwealth rested, the defendant moved for a required finding of not guilty on the charge of unlawful possession of a firearm, arguing that because the Commonwealth had not introduced direct evidence of the gun's length, the Commonwealth had not proved that the gun met the statutory definition of a firearm. The judge allowed the motion. The allowance of the motion was not communicated to the jury, but it was recorded on the docket.

Later that day, after the defense had rested and before closing argument, the Commonwealth called the judge's attention to *Commonwealth v. Sperrazza, 372 Mass. 667, 670, 363 N.E.2d 673 (1977)*, in which the Supreme Judicial Court held that testimony that

a gun was a pistol or revolver was sufficient evidence to permit a firearm charge to go to the jury. In light of the case law, the trial judge concluded that the Commonwealth had, in fact, met the Latimore n4 **[**982]** standard because the Commonwealth had introduced testimony that the gun was a "pistol" and that it was a ".32 or .38," from which a jury **[***6]** could infer that the gun was less than sixteen inches. The judge decided to submit the charge to the jury. The docket reflects that the motion for required finding of not guilty had been reconsidered and was denied.

n4 *Commonwealth v. Latimore, 378 Mass. 671, 677-678, 393 N.E.2d 370 (1979).*

The defendant argues that the judge erred because once the motion for a required finding was allowed, jeopardy terminated as to that charge, and the decision cannot be reversed regardless **[*170]** of whether the judge was factually or legally in error in allowing the motion. The Commonwealth responds that because the charge was submitted to the same jury that had heard the evidence, the defendant was not subjected to double jeopardy.

Massachusetts common law and the *Fifth Amendment to the United States Constitution* protect criminal defendants from being placed twice in jeopardy in three circumstances: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after **[***7]** conviction; and (3) multiple punishments for the same offense. See *North Carolina v. Pearce, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969); Luk v. Commonwealth, 421 Mass. 415, 419, 658 N.E.2d 664 (1995).* The defendant's argument implicates only the first circumstance, a second prosecution after acquittal. See *Commonwealth v. Lowder, 432 Mass. 92, 103, 731 N.E.2d 510 (2000).*

We conclude that double jeopardy protections were not violated in these circumstances because the judge's correction of her ruling did not require a second proceeding. See, e.g., *Commonwealth v. Haskell, 438 Mass. 790, 792, 784 N.E.2d 625 (2003)* (judge's power to reconsider his or her own decisions during pendency of case is firmly rooted in common law); *United States v. Washington, 48 F.3d 73, 79 (2d Cir.)*, cert. denied, *515 U.S. 1151, 132 L. Ed. 2d 843, 115 S. Ct. 2596 (1995)* (trial judge properly reversed entry of acquittal, after defense case began, where judge did so before informing jury); *United States v. Baggett, 251 F.3d 1087, 1095 (6th Cir. 2001)*, cert. denied, *534 U.S. 1167, 152 L. Ed. 2d 126, 122 S. Ct. 1184 (2002)* **[***8]** (conviction upheld where trial court entered acquittal but then submitted charge to jury because such reversal did not require retrial). See also *Price vs. Vincent, U.S. Supreme Court, 155 L. Ed. 2d 877, 123 S. Ct. 1848, 2003 U.S. LEXIS 3678,No. 02-524, slip op. at 6-8 (U.S. May 19, 2003)* (reasonable for State court to conclude that judge's comments were not sufficiently final to terminate jeopardy). Furthermore, "a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *United States v. Wilson, 420 U.S. 332, 345, 43 L. Ed. 2d 232, 95 S. Ct. 1013 (1975).*

The defendant also argues that the correction was improper under Mass.R.Crim.P. 25(a), *378 Mass. 896 (1979),* because the rule requires that the judge decide a motion made at the close of the Commonwealth's evidence at the time the motion is **[*171]** made. n5 The requirement of a prompt ruling "protects a defendant's right to insist that the Commonwealth present proof of every element of the crime with which he is charged before he **[**983]** decides whether to rest or to introduce proof in a contradiction or exoneration." *Commonwealth v. Cote, 15 Mass. App. Ct. 229, 240, 444 N.E.2d 1282 (1983).* **[***9]** This protection was honored. The defendant has not suggested that the initial allowance of the





motion affected his trial strategy with regard to the other charges. Moreover, the Commonwealth did not introduce any additional evidence, and the defendant was provided the opportunity to reopen his case.

n5 Rule 25(a) of the Massachusetts Rules of Criminal Procedure provides, "If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, it shall be ruled upon at that time" (emphasis added).

Additionally, the defendant has not indicated how the requirement precludes a judge from correcting a ruling. Compare *Commonwealth v. Rice, 216 Mass. 480, 482-83, 104 N.E. 347 (1914)* (no violation of double jeopardy protections by District Court judge's withdrawal of finding of guilt and declination of jurisdiction because case had not been ended at time judge withdrew guilty finding); *Fine v. Commonwealth, 312 Mass. 252, 258, 44 N.E.2d 659 (1942)* **[***10]** (judge has power to alter or amend his decision on motion for new trial at any time during pendency of proceedings before him).

Furthermore, the evidence was not insufficient as matter of law. Compare *Commonwealth v. Ierardi, 17 Mass. App. Ct. 297, 303, 457 N.E.2d 1127 (1983)* (no violation of right not to be put twice in jeopardy where judge indicated he would allow motion for required finding of not guilty but then permitted Commonwealth to reopen its case and enter stipulation into evidence). Contrast *Commonwealth v. Zavala, 52 Mass. App. Ct. 770, 779, 756 N.E.2d 29 (2001)* (Commonwealth may not reopen its case when evidence is insufficient as matter of law).

Finally, the defendant was not otherwise prejudiced by the ruling. The jury were not aware that the judge had allowed the motion and the correction of the ruling was made before closing arguments. The judge did not err by correcting her ruling in these circumstances.

**[*172]** b. Unlawful possession of a firearm (fourth offense). A jury-waived trial was held on the portion of the indictment which alleged that the defendant was a four-time offender of the firearms law. See *G. L. c. 269, § 10,d* **[***11]** . The defendant claims that the judge erred by relying on a Federal conviction for violating the "felon-in-possession" provisions of *18 U.S.C. § 922(g)(1)* as one of the three earlier firearms convictions.

*Section 10*(d) of c. 269 provides:

"Whoever, after having been convicted of any of the offenses set forth in paragraph (a), (b) or (c) commits a like offense or any other of the said offenses, shall be punished ... for a fourth such offense ...."

The defendant argues that the statute does not specifically permit convictions from other jurisdictions to serve as predicate offenses under *§ 10*(d) and that, in fact, only another conviction for a violation of *§ 10*(d) may be a "like offense." We disagree.

The language of *G. L. c. 269, § 10*(d), that conviction may be for a "like offense," does not prohibit Federal convictions from being used as predicate offenses. Contrast *Youngworth v. Commonwealth, 436 Mass. 608, 611-612, 766 N.E.2d 834 (2002)* (language in habitual offender statute requiring predicate convictions "in this or another state" precluded use of Federal **[***12]** conviction). Rather, the statute speaks of a "like offense."

We find no support for the defendant's claim that only another conviction for a violation of *§ 10*(d) may be a "like offense." Had the Legislature intended such a requirement, it would have expressly stated so. *Commonwealth v. Brown, 431 Mass. 772, 775, 730 N.E.2d 297 (2000).*

**[**984]** The statute does not define a "like offense." Where a statutory term is undefined, we may interpret it "in accordance with its generally accepted plain meaning." *Commonwealth v. Boucher, 438 Mass. 274,*

*276, 780 N.E.2d 47 (2002)*. The generally accepted, plain meaning of "like," in this context, means "the same or nearly the same." Webster's Third New International Dictionary 1310 (1993). See *Commonwealth v. Corbett, 422 Mass. 391, 396, 663 N.E.2d 259 (1996)* (under plain and ordinary meaning of term "like offenses," prior convictions for operating under influence were **[*173]** "like offenses" even though prior offenses were misdemeanors and third offense was felony, where elements remained same).

Although the elements of the Federal statute are not identical to the State statute, the offenses proscribed **[***13]** by both statutes are sufficiently alike to be considered "like offenses" for purposes of *G. L. c. 269, § 10*(d). Both statutes are concerned with keeping firearms out of the hands of those not legally entitled to possess them, in particular, people with felony convictions. See *Huddleston v. United States, 415 U.S. 814, 824, 39 L. Ed. 2d 782, 94 S. Ct. 1262 (1974)*; *Barrett v. United States, 423 U.S. 212, 220, 46 L. Ed. 2d 450, 96 S. Ct. 498 (1976)*; *Commonwealth v. Moore, 54 Mass. App. Ct. 334, 344 n.8, 765 N.E.2d 268 (2002)* (intent of *G. L. c. 269, § 10*, is to protect public from potential danger incident to unlawful possession of such weapons). See also *General Elec. Co. v. Department of Envtl. Protection, 429 Mass. 798, 805 n.8, 711 N.E.2d 589 (1999)* (concluding that two statutes "are like statutes in that similar public policy considerations underlie both statutes"). Cf. *Commonwealth v. Alvarez, 413 Mass. 224, 230 n.5, 596 N.E.2d 325 (1992)* (suggesting that *G. L. c. 94C, § 32J*, is "like" Federal and other State **[***14]** school zone statutes). The Federal conviction properly served as a predicate offense in these circumstances.

c. Peremptory challenges to three of the four white females. During jury selection, codefendant Brown's attorney challenged three of the four white female jurors. See *Commonwealth v. Jordan, 439 Mass. 47, 62, 785 N.E.2d 368 (2003)* (concluding that art. 12 of Massachusetts Declaration of Rights proscribes use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in group delineated by race and gender). The defendant did not object, but the prosecutor did. The prosecutor asked the judge to find that Brown's attorney had engaged in a pattern of discriminatory strikes. The judge declined, stating, "I'm not going to [address the issue] at this time."

Now the defendant claims that the judge failed to follow the procedural requirements articulated in *Commonwealth v. Burnett, 418 Mass. 769, 770-771, 642 N.E.2d 294 (1994)*. According to the defendant, the judge should have made an explicit finding regarding whether the required prima facie showing of impropriety had been made. *Id. at 771*. **[***15]** Although the judge did not follow the procedure established by the Supreme Judicial **[*174]** Court, procedural error is not a per se ground for reversal. *Commonwealth v. Calderon, 431 Mass. 21, 27, 725 N.E.2d 182 (2000)*. The defendant failed to object. If there was error, our review is limited to whether there exists a substantial risk of a miscarriage of justice. n6 **[**985]** *Commonwealth v. Randolph, 438 Mass. 290, 294, 780 N.E.2d 58 (2002)*. We conclude that the judge's statement constituted an implicit finding that no discriminatory pattern of peremptory challenges had been demonstrated. If the judge's finding is supported by the record, we afford it substantial deference. *Commonwealth v. Cavotta, 48 Mass. App. Ct. 636, 638, 724 N.E.2d 332 (2000)*.

n6 We reject the defendant's attempt to derive a more favorable standard of review based on the Commonwealth's objection to the peremptory challenges. We also reject the defendant's attempt, based on the Commonwealth's unsuccessful objection at trial to Brown's exercise of her peremptory challenges, to preclude the Commonwealth from arguing on appeal that Brown's exercise of her peremptory challenges was proper. The defendant has not substantiated either argument with relevant authority. The defendant suggests that his counsel's failure to object constituted ineffective assistance of counsel. For purposes of this appeal, we equate the substantial risk standard and the ineffective assistance of counsel standard. *Commonwealth v. Randolph, 438 Mass. 290, 297, 780 N.E.2d 58 (2002)*.





**[***16]**

There was no showing of gender-based strikes. After three women had been struck from the jury, two of the three women were replaced with women; therefore, the net effect was a reduction in the number of women on the jury by just one. See *Commonwealth v. Hyatt, 409 Mass. 689, 692, 568 N.E.2d 1148 (1991)* (where two white jurors were replaced with white jurors, there was no showing of race-based strikes); *Commonwealth v. LeClair, 429 Mass. 313, 320-321, 708 N.E.2d 107 (1999)* (judge acted within his discretion in finding no prima facie case of discriminatory challenges where replacement venire contained roughly equal numbers of men and women and prosecutor struck eight of eleven men and no women). In the present case, there were five women on the deliberating jury.

We are unable to discern from the record the race of the female jurors in the venire or on the deliberating jury. See *Commonwealth v. Arriaga, 438 Mass. 556, 571-572, 781 N.E.2d 1253 (2003)*. In these circumstances, where the record is silent as to the racial composition of the venire and the jury, we cannot conclude that the defendant has met his burden of overcoming **[***17]** the presumption that the peremptory challenges were proper. See *Commonwealth v. Burnett, 418 Mass. at 770* **[*175]** (presumption of correctness ordinarily attends exercise of peremptory challenges).

d. Prosecutorial misconduct. The defendant argues that errors made by the prosecutor established a pattern of intentional misconduct which infected the trial with prejudicial error. We have examined each claim and conclude that the allegations of prosecutorial misconduct are unwarranted.

i. The prosecutor's opening statement. Brown was tried with the defendant on charges of being an accessory after the fact. In his opening, the prosecutor explained to the jury the Commonwealth's theory of the case against both defendants. The prosecutor told the jury that the Commonwealth had to prove that Brown "did something to assist Mr. Smith in avoiding detection, capture, trial, or punishment. And in this case, it's the Commonwealth's allegation that she lied." The defendant moved for a mistrial, which was denied. The defendant argues that because the judge allowed the defendant's motion to sever Brown's perjury charge, the prosecutor should not have been permitted to state in opening **[***18]** that it was the Commonwealth's position that Brown lied to the police. n7

n7 Brown told the police that the defendant was outside the house in a car when Robinson was shot.

The statement was not improper. "Generally, a prosecutor in a criminal action may state anything in his opening **[**986]** argument that he expects to be able to prove by evidence." *Commonwealth v. Cohen, 412 Mass. 375, 382, 589 N.E.2d 289 (1992)*. This general rule also permits the prosecutor to state those facts which would have to be proved by inferences. *Commonwealth v. Johnson, 429 Mass. 745, 748, 711 N.E.2d 578 (1999)*. Whether Brown had lied was a central issue in the case, and relevant to the charge of accessory after the fact.

ii. Testimony of Detective Smith about the grand jury. During cross-examination, defense counsel elicited from Detective Smith that he

had gone to 33 Lawn Street to serve grand jury subpoenas although he had not attempted to interview Patrick Veridieu or Elaine Shaw. During redirect **[***19]** examination, the prosecutor asked Detective Smith whether Veridieu and Shaw had testified before the grand jury. Detective Smith answered that they had.

The defendant objected but the record does not establish the **[*176]** basis of the defendant's objection. An objection must be sufficient to make the grounds clear to the judge. See *Commonwealth v. Rivera, 425 Mass. 633, 636, 682 N.E.2d 636* & nn.1 & 2 (1997); *Commonwealth v. Houghtlin, 16 Mass. App. Ct. 691, 695, 454 N.E.2d 1289 (1983)*. Our review is limited, if there is error, to whether any error created a substantial risk of a miscarriage of justice.

The defendant argues that Detective Smith's testimony was hearsay because Detective Smith had no personal knowledge of whether either Veridieu or Shaw testified before the grand jury. The defendant further argues that such hearsay testimony impermissibly suggested that the prosecutor possessed information against the defendant which was not in evidence and that the erroneous admission of the testimony concerning Veridieu effectively left the defendant without a defense: that Veridieu was the shooter. See *Commonwealth v. Loguidice, 420 Mass. 453, 455, 650 N.E.2d 1254 (1995)*. **[***20]**

The defendant's challenge on grounds that the testimony was "hearsay" is not persuasive. The defendant's point appears to be that since Detective Smith could not be present in the grand jury room when Veridieu and Shaw appeared, he could only know whether Shaw and Veridieu testified based on the statements of another. The Commonwealth was entitled to rebut the inference suggested by the defendant that the police investigation was inadequate or that they had not diligently pursued the investigation. See *Commonwealth v. Carrion, 407 Mass. 263, 274-275, 552 N.E.2d 558 (1990)*. There was no error, but if there were it would not rise to the level of a substantial risk of a miscarriage of justice.

iii. References to the defendant's criminal history. The defendant claims that Detective Smith's reference to the defendant's photograph as being from a booking sheet and another witness's references to the defendant's photograph as a "mugshot" constituted prejudicial error and that the judge erred in not granting his motions for a mistrial. Instead, on each occasion, the judge promptly instructed the jury to disregard the reference. We conclude that the witnesses' missteps **[***21]** did not require a mistrial and that the judge's instructions to the jury to **[*177]** disregard the references were sufficient in these circumstances. n8 See **[**987]** *Commonwealth v. Robertson, 408 Mass. 747, 753, 563 N.E.2d 223 (1990)*; *Commonwealth v. Ellerbe, 430 Mass. 769, 781, 723 N.E.2d 977 (2000)*; *Commonwealth v. Lanning, 32 Mass. App. Ct. 279, 284, 589 N.E.2d 318 (1992)*. In addition, the judge twice instructed the jury to draw no inferences from the fact that the police had the defendant's photograph in their possession.

n8 The jury were aware that the witnesses were not shown the photographs until several weeks after the defendant had been arrested for the crime. Therefore, the fact that the defendant had been through the booking process or that "mugshots" of the defendant existed would not prejudice the defendant.

iv. Details about Robinson's injuries and recuperation and reference to his suffering. The defendant argues that introduction of evidence concerning the **[***22]** extent of Robinson's injuries and medical complications was substantially more unfairly prejudicial than probative and that the Commonwealth unnecessarily referred to Robinson's suffering





in closing argument. The defendant objected to the admission of the medical testimony, so we review to determine whether any error was prejudicial. The defendant did not, however, object to the admission of the medical records or to the closing argument, so our review is limited to whether any error created a substantial risk of a miscarriage of justice.

The Commonwealth argues that the judge did not err in admitting such evidence because the evidence was (1) probative of the defendant's intent to kill; (2) relevant because one of the defense theories was that Robinson had changed his story to conform to his injuries; and (3) relevant to establish Robinson's physical condition at the time he identified the defendant's photograph.

We agree that the testimony concerning the location of Robinson's wounds and the extensive organ damage he suffered was admissible because it was probative of the issue whether the assailant intended to kill Robinson. See *Commonwealth v. Gill, 37 Mass. App. Ct. 457, 463-464, 640 N.E.2d 798 (1994)*. **[***23]** The testimony concerning the subsequent treatment and medical complications, including life-threatening infections, was not relevant on this point. It was, however, relevant as it bore on Robinson's ability to communicate with the police and identify the defendant while in the hospital.

**[*178]** The extensive and detailed medical testimony concerning Robinson's need for a liver transplant to avoid death from complications due to the destruction of his digestive system stretched the limits of relevance. Any error in its admission was not prejudicial, however, as it was cumulative of the other properly admitted evidence of Robinson's injuries and treatment, including Robinson's appearance before the jury. *Commonwealth v. Moreschi, 38 Mass. App. Ct. 562, 566-567, 649 N.E.2d 1132 (1995)*.

The medical records were relevant because they assisted the jury in understanding the medical evidence. See *Commonwealth v. McDougal, 2 Mass. App. Ct. 820, 821, 309 N.E.2d 891 (1974)*; *Commonwealth v. Gill, 37 Mass. App. Ct. at 464*.

The reference in closing argument to Robinson's suffering was but one sentence in an otherwise proper argument. In the context of **[***24]** the entire argument, the defendant's concession that Robinson suffered egregiously, and the lack of an objection, the comment did not create a substantial risk of a miscarriage of justice. *Commonwealth v. Duguay, 430 Mass. 397, 403-404, 720 N.E.2d 458 (1999)*.

e. Alleged Bruton violations. The defendant claims that his confrontation rights were abridged by the introduction of certain statements of Brown, in violation of **[**988]** *Bruton v. United States, 391 U.S. 123, 137, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968)*. "According to Bruton, severance is constitutionally required where: a codefendant's extrajudicial statements are offered in evidence at a joint trial; the statements are 'clearly inadmissible' as against the defendant; the codefendant does not testify; and finally, there is a substantial possibility that, in determining the defendant's guilt, the jury relied on the codefendant's 'powerfully incriminating extrajudicial statements' notwithstanding any limiting instructions from the judge." *Commonwealth v. Adams, 416 Mass. 55, 58, 617 N.E.2d 594 (1993)*, quoting from *Commonwealth v. Pontes, 402 Mass. 311, 314, 522 N.E.2d 931 (1988)*. **[***25]**

Here, the defendant does not argue that his trial should have been severed from Brown's trial; rather, he argues that certain statements should not have been admitted. This is a difficult argument for the defendant as he pursued a trial strategy which depended on Brown's statements. In fact, he moved to sever only the perjury charge and stated that "Felicia Brown is [the **[*179]** defendant's] best defense." n9 The defendant did not object to the admission of most of the testimony concerning Brown's statements to Detective Smith or request a limiting instruction. "In

reviewing the defendant's conviction, we will 'not disregard the theory of law on which the parties proceeded at trial.'" *Commonwealth v. Silva, 431 Mass. 401, 405, 727 N.E.2d 1150 (2000)*, quoting from *Commonwealth v. Monteagudo, 427 Mass. 484, 487, 693 N.E.2d 1381 (1998)*. Considering the defendant's trial strategy, the jury's consideration of the hearsay testimony n10 did not create a substantial risk of a miscarriage of justice. n11 *Commonwealth v. Silva, 431 Mass. at 406.*

n9 For a discussion of some circumstances in which a defendant has waived his right to confront witnesses under the *Sixth Amendment to the United States Constitution*, see *United States v. Stephens, 609 F.2d 230, 232-233 (5th Cir. 1980)*; *Brown v. Artuz, 124 F.3d 73, 77 (2d Cir. 1997)*, cert. denied, *522 U.S. 1128, 140 L. Ed. 2d 135, 118 S. Ct. 1077 (1998)*; *United States v. Reveles, 190 F.3d 678, 683 (5th Cir. 1999)*; *United States v. Plitman, 194 F.3d 59, 64 (2d Cir. 1999)*. **[***26]**

n10 The alleged hearsay statements are Brown's statement to police that she was under pressure; the prosecutor's reference in closing argument to Brown's grand jury testimony; and two witnesses' testimony of Brown's statements to them.

n11 The standard of review is substantial risk of a miscarriage of justice because the defendant either did not object below to the testimony being admitted or, when an objection was raised, did not state any constitutional grounds. See *Commonwealth v. Fowler, 431 Mass. 30, 41 n.19, 725 N.E.2d 199 (2000)*.

In looking at each statement, we hold that no error occurred, although for varying reasons dependent upon the statement. See *Commonwealth v. Devlin, 365 Mass. 149, 159, 310 N.E.2d 353 (1974)* (statement admissible against defendant as statement of joint venturer); *Commonwealth v. Yesilciman, 406 Mass. 736, 746, 550 N.E.2d 378 (1990)* (remarks made during closing argument are viewed in context of entire argument and in light of judge's instructions to jury and evidence at trial); *Commonwealth v. Ivy, 55 Mass. App. Ct. 851, 857-858, 774 N.E.2d 1100 (2002)* **[***27]** (to exclude such probative statements under strictures of *confrontation clause of Sixth Amendment to United States Constitution* would be height of wrongheadedness, given that confrontation clause has as basic purpose promotion of integrity of fact-finding process). See also *Bruton v. United States, 391 U.S. at 135* (statement not "powerfully incriminating extrajudicial statement[]").

**[**989]** f. Cumulative error. The defendant argues that the alleged errors **[*180]** created a "cumulative" effect requiring reversal. See *Commonwealth v. Smith, 387 Mass. 900, 912, 444 N.E.2d 374 (1983)*. As we have concluded that the one error (in the admission of medical testimony regarding Robinson's need for a liver transplant) did not prejudice the defendant, we reject the defendant's claim.

Judgments affirmed.

Order denying motion for a new trial affirmed.



11/13/98 - Hearing re: Reconsideration of defendant's motion for Required Finding of Not Guilty After Hearing, Taken under Advisement Donovan, RAJ
Attest: Marybeth Brady Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS. SUPERIOR COURT
NO. 98 - 11521

11-18-98 Reconsideration denied Donovan, RAJ

COMMONWEALTH

V.

MELVIN SMITH

MOTION FOR REQUIRED FINDING

Now comes the defendant in the above - entitled matter, Melvin Smith, and moves this Honorable Court to order a finding of not guilty to enter on this indictment.

The defendant moves for a required finding on two grounds. First, the Commonwealth has not presented any evidence that the barrel of the firearm used in this case was less than sixteen inches, a necessary element of the crime. See Commonwealth v. Hamilton, 426 Mass. 67(1997), and Commonwealth v. DeJesus, 44 Mass. App. Ct. 349(1998). In accord, Commonwealth v. Muse, 35 Mass. App. Ct. 466. In the DeJesus case the only evidence offered regarding the firearm was the victim's statement that the firearm was a shotgun. In order for the statute to apply there needed to be evidence presented that the length of the barrel was "less than eighteen inches". When no such evidence is produced it is error to deny the defendant's Motion for Required Finding.

In the case now before the court, the only evidence regarding the firearm was Mr. Robinson's testimony that he observed a .32 caliber revolver in Mr. Smith's hand. No further description was given of the gun, not even whether the barrel was long or short. Under these circumstances the defendant is entitled to a required finding of not guilty as to this indictment.

11/12/98 - Filed and after hearing. Allowed
Donovan, J.
Attest: Marybeth Brady Assistant Clerk

11/12/98 - After reconsideration, defendant's Motion for Required Finding is Denied
Donovan, J.
Attest: Marybeth Brady Assistant Clerk

The second basis for the Motion For Required Finding is that the defendant is charged with a violation of G. L. c269, section 10(a), possession of a firearm, not at home or work. The evidence in this case does not show the defendant is not entitled to the exemption provided by G.L. c269, section 10(h), in that the testimony supports one of two propositions, either of which results in the entry of a not guilty finding as Mr. Smith was 'at home' at the time of the alleged violation.

Mr. Robinson testified that Mr. Smith was 'staying' at 33 Lawn Street, third apartment, at the time of the shooting. When Mr. Robinson was asked who was staying at that address during the time he was staying there, he listed the following people: Romanis Charles, himself, Felicia Brown and Melvin Smith. If in fact Mr. Smith was staying at 33 Lawn Street, then he was at home at the time of the alleged possession and is entitled to a not guilty finding. Even if the stay was temporary, Mr. Smith is entitled to the same outcome. In cases such as Commonwealth v. Brass, 42 Mass. App. Ct. 88(1997), it has been the suggestion of the appellate courts that a temporary visitor is still entitled to the rights and privileges of calling his temporary shelter his home. The United States Supreme Court and the Supreme Judicial Court have held that a hotel guest has a reasonable expectation of privacy during the time of his authorized occupancy. See Stoner v. California, 376 U.S. 483(1964), and Commonwealth v. Paszko, 391 Mass. 164(1984).

If Mr. Smith is not entitled to the 'at home' exception suggested by Mr. Robinson's testimony that Mr. Smith was staying at that location, then Mr. Smith is entitled to a finding of not guilty on the basis of being a guest in the home of Felicia Brown. The evidence in the case is clear that Mr. Smith was on the premises legally and with the consent, and at the invitation of Ms. Brown. He is, at worst, her guest. Ms. Brown could not be found guilty of a violation of section 10(a) for the actions attributed to Mr. Smith. As Ms. Brown's guest, neither should Mr. Smith. Just as hotel guests are given constitutional rights while they are lawfully on the premises, so too should a



guest be afforded the same protections as the resident of a home. In G.L. c278, section 8A(the so-called 'castle' statute), the legislature set out an exception to the flight rule before defending oneself. It gives the resident a defense if the "...occupant was in his dwelling at the time of the offense." It is unimaginable that the legislature did not intend a resident's legitimate guest in the dwelling to have the same protection and the same defense. So too should a lawful guest have the same rights and protections as the resident under the statutory scheme contained in G.L. c269, section 10(a), and 10(h). It would be anomalous for the legislature to criminalize the conduct of a guest in possession of a homeowner's firearm when the host's identical conduct would not be criminal, or subject to the same punishment.

For the foregoing reasons, the defendant's Motion For Required Finding should be allowed.

Respectfully submitted,

Bruce W. Carroll
50 Beacon Street, 2d Floor
Boston, Ma. 02108
720 - 1413
BBO# 075840

63

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 96 SUCR 11471
98 SUCR 11521

COMMONWEALTH OF MASSACHUSETTS

vs.

MELVIN T. SMITH

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL**

**INTRODUCTION**

Defendant Melvin T. Smith ("Smith"), convicted on charges of assault with intent to murder, assault and battery by means of a dangerous weapon, and unlawful possession of a firearm (fourth offense), has filed the instant motion for a new trial pursuant to Mass.R.Crim.P. 30(b). Smith, through counsel, asserts that the trial judge committed eight separate errors which necessitate a new trial.

For the reasons set forth below, the defendant's motion for a new trial is **DENIED**.

**BACKGROUND**

On November 16, 1998, a Suffolk Count jury convicted Melvin T. Smith of armed assault with intent to murder, G.L. c. 265, § 18, assault and battery by means of a dangerous weapon, G.L. c. 265, § 15A, and unlawful possession of a firearm. G.L. c. 268, § 10. Subsequent to the convictions, the court proceeded to trial on the second



and subsequent portion of the unlawful possession of a firearm indictment. Following the jury-waived trial, the court convicted Smith of a fourth offense of unlawful possession of a firearm. G.L. c. 269, § 10(d). It is from these convictions that Smith has filed his motion for a new trial. Mass.R.Crim.P. 30(b).

The victim in the instant case, Christopher Robinson ("Robinson"), was the first cousin of Felicia Brown ("Brown"), the then-girlfriend of Smith. Brown and Robinson were close, and often visited each other. In August 1996, Brown's mother traveled out of town for two weeks and allowed Robinson to stay with Brown at her house while she was away.

It was during this time that Robinson became acquainted with Smith. The two men allegedly had a friendly relationship and often spoke. On August 15, 1996, Robinson had spent the day drinking. Over the course of twelve hours, he had consumed a fifth of vodka and at least forty ounces of beer. Later that same day, Robinson, Brown, and Smith all ate dinner together. There was no evidence of any malevolent behavior by any one party against any other.

At approximately 4 a.m., Robinson walked downstairs. When he reached the bottom of the staircase, he saw Smith and Brown in Brown's bedroom. Smith, according to Robinson, was holding "a pistol," which appeared to be either "a .32 or a .38." Smith fired the gun, hitting Robinson three times. Smith then turned to Brown and said, "let's go," in an effort to leave the house. Robinson then said, "I know who you are, Melvin. Why you shoot me? Why you shoot me? I know who you are. You[r] name is Melvin." Robinson stated that Brown said, "His last name is Smith." Brown and Smith left the house, while Brown's step-father, who had heard the three shots, called

for assistance.

Boston Police Officer Wayne Clark ("Clark") responded to the 911 call. When Clark asked Robinson who had shot him, Robinson responded, "Melvin." When Clark asked for Melvin's last name, Robinson stated that he did not know it. Robinson did tell Clark that Melvin was Brown's boyfriend.

Robinson was transported to Brigham & Women's Hospital, where he underwent surgery. By September 7, 1996, Robinson was still on a ventilator, but was able to communicate non-verbally. Robinson was asked by a Boston detective to look at a photo array and identify the person who shot him. Robinson was able to identify Smith.

Robinson testified at Smith's trial. Following Smith's convictions, Robinson died due to liver damage that resulted from the gun shot wounds. Subsequently, a Suffolk Count Grand Jury indicted Smith on murder charges. That trial has yet to occur.

**DISCUSSION**

"The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." Mass.R.Crim.P. 30(b). A motion for a new trial is addressed to the sound discretion of the judge, and the judge's disposition of the motion will not be reversed unless it is manifestly unjust or unless the trial was infected with prejudicial constitutional error. See Commonwealth v. Moore, 408 Mass. 117, 125 (1990) (internal citations omitted).

In the instant case, Smith raises eight issues in which he alleges error. Specifically, Smith contends that: (1) Smith's joint trial with non-testifying co-defendant Brown deprived Smith of his constitutional right to confront and cross-examine his



accusers, particularly where Robinson testified to a statement of Brown's which identified Smith as the shooter; (2) Brown presented an antagonistic defense whereby, at the last minute, she accused Smith of being the shooter and of menacing Brown into covering for him; (3) Smith was deprived of his constitutional right to counsel where the trial judge answered nine questions from the jury without first giving counsel an opportunity to be heard; (4) Smith was placed in double jeopardy where the trial judge allowed Smith's motion for a required finding of not guilty on the possession of a firearm indictment at the close of the Commonwealth's case, but then "reinstated" the charge after Smith had rested; (5) Smith was deprived of his right to an impartial jury when counsel for Brown exercised peremptory challenges in a discriminatory manner; (6) the jury was erroneously instructed on excessive force in self-defense because the instruction misplaced the burden of proof; (7) Smith was deprived of his due process rights where his conviction for possession of a firearm (fourth offense) rested on insufficient evidence; and (8) Smith was deprived of a fair trial where a crucial witness to the identification issue gave trial testimony which was materially different from her voir dire testimony.

At trial, counsel for Smith objected and preserved for appeal only two of the aforementioned issues; issues four and eight. Therefore, this memorandum addresses the merits of only Smith's double jeopardy argument and Smith's contention that a crucial identification witness gave trial testimony that was materially different from her voir dire testimony. Issues one, two, three, five, six, and seven were not objected to at trial, are deemed waived, and this court expressly declines to resurrect them. See Commonwealth v. Sowell, 34 Mass. App. Ct. 229, 230-231 (1993) (no resurrection

where trial judge expressly stated he was not addressing certain issues in motion for new trial where issues could have been raised either at trial or in direct appeal).

**I. "Reversal" of the Allowance of Smith's Motion for Required Finding of Not Guilty on the Firearms Offense.**

Smith contends that the court erred in "reversing" its allowance of the defendant's motion for a required finding of not guilty on the firearms offense. During trial, after the Commonwealth had completed its case, the court allowed Smith's motion for a required finding of not guilty on the firearms charge. However, after the defendant's case, the court, relying on Commonwealth v. Sperrazza, 372 Mass. 667 (1977), withdrew its allowance of Smith's motion and allowed the firearms charge to go to the jury.[1] Smith was subsequently convicted on the charge. In seeking a new trial, Smith contends that the court's allowance, and then subsequent withdrawal of the allowance, placed Smith in double jeopardy, in violation of Smith's constitutional rights. There was no error.

A criminal defendant has a constitutional right not to be placed in jeopardy twice for the same offense. Commonwealth v. Lowder, 432 Mass. 92, 103 (2000). When a defendant has been put in jeopardy for an offense and acquitted, he may not be retried for that offense. Id. The defendant, relying on the above-stated rule, contends that the

[1] At issue in Smith's trial with respect to the firearms charge was the length of the weapon's barrel. The Commonwealth was required to prove that the barrel was less than sixteen inches. G.L. c. 269, § 10(a); G.L. c. 140, § 121. At trial, Robinson testified that the weapon was "a pistol," and "a .32 or a .38." In Commonwealth v. Sperrazza, 372 Mass. 667 (1977), which the court finds apposite in this case, the Supreme Judicial Court held that a jury may infer that a barrel was less than sixteen inches where there was testimony that the gun was a "revolver" or a "handgun" even though no evidence as to the barrel's length was presented.



allowance of the motion, and then the subsequent withdrawal of it later in the trial, placed him in double jeopardy because upon the court's allowance of the motion, jeopardy terminated as to that charge. See Lowder, 432 Mass. at 103. At first blush, Smith's argument appears to have merit, but crumbles when viewed with an eye towards the policy reasons behind double jeopardy.

The United States Supreme Court traced the development of the double jeopardy clause in the constitution, and noted that "[a]t the heart of the policy is the concern that permitting the sovereign freely to subject the citizens to a second trial for the same offense would arm Government with a potent instrument of oppression." United States v. Martin Linen Supply Co., 430 U.S. 564, 568-569 (1977). The clause, the Court held, was enacted so that the State may not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense, and causing him to live in a state of anxiety and insecurity, all the while wondering if he may be found guilty or innocent. Id. at 569. However, where there are no threats of successive prosecution, the double jeopardy clause is not offended. Id. at 569-570.

The instant case is, in principle, analogous to the situation where a jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal. In such a case, an appeal by the government is permitted because a conclusion by an appellate court that the judgment of acquittal was improper does not require the defendant to submit to a second trial; the error can be corrected on remand by the entry of judgment on the verdict. See United States v. Jenkins, 420 U.S. 358, 365 (1975), *overruled on other grounds*, United States v. Scott, 437 U.S. 82 (1978); Commonwealth v. Elder, 389 Mass. 743, 749 (1983). In the instant case, Smith was not, and would not have been,

required to submit himself to a second trial. The erroneous allowance of the motion for a required finding of not guilty was corrected before closing arguments, and Smith's counsel had the option to seek a re-opening of the evidence. Smith's counsel did not do so, and it is unlikely he could have produced evidence disputing the length of the firearm used in the shooting because any evidence with respect to Smith's knowledge of the firearm's length would be an implicit admission that he used and/or possessed the weapon.[2]

Although no reported Massachusetts case reflects the facts herein, an analogous decision supporting the Commonwealth's contention that the double jeopardy clause did not bar the submission to the jury of the firearms offense is Commonwealth v. Ierardi, 17 Mass. App. Ct. 297 (1983). In that case, after the defendant was found guilty of the substantive portions of a firearms offense, the Commonwealth introduced evidence of prior convictions in an effort to prove that it was the defendant's third such offense. The defendant moved for a required finding of not guilty, and the trial judge allowed the motion because the Commonwealth had failed to establish that the defendant was the same person named in the prior two convictions. Id. at 303. The Commonwealth then

[2] Indeed, a trial judge has discretion to re-open evidence when mere inadvertence or some other compelling circumstance... justifies a re-opening and no substantial prejudice will occur. Commonwealth v. Cote, 15 Mass. App. Ct. 229, 241 (1983). In Cote, the trial judge allowed the re-opening of the Commonwealth's case after it rested, and after the defendant had moved for a required finding of not guilty. Id. at 238-240. The Appeals Court held that in so doing, the trial judge did not commit error because the failure to provide evidence with respect to a particular issue stemmed from a good faith, albeit erroneous, belief by the Commonwealth that a particular burden of proof rested with the defendant, and by allowing the Commonwealth to put on evidence to establish what it was required to prove did not prejudice the defendant. Id. at 242-243. Similarly, as noted above, in this case, Smith suffered no prejudice by the court's "reversal" of its allowance of a required finding of not guilty.



moved to re-open its case, informing the judge that it had intended to call the defendant's counsel on the two prior convictions as a witness to establish the necessary identification but had not done so because current defense counsel had agreed to stipulate to identity. Defense counsel acknowledged the stipulation, and the judge allowed the Commonwealth to re-open its case to admit the stipulation. The Appeals Court held, without elaborating, that on those facts there was no violation of the defendant's right not to be put twice in jeopardy. Id.

Smith's reliance on Lowder, 432 Mass. 92, and Commonwealth v. Super, 431 Mass. 492 (2000), is misplaced because in those cases, dismissal on double jeopardy grounds was upheld because retrial of the defendant would have required the empaneling of a second jury. In this case, where Smith was convicted by the same jury that first heard the evidence against him, and no second jury was needed, Smith was not placed in double jeopardy in violation of his constitutional rights.

## II. The Identification Witness' Trial Testimony

Smith contends that an unfair surprise occurred because Nurse Diane Tavares ("Tavares"), one of Robinson's hospital caretakers, changed her testimony with respect to Robinson's hospital room identification of Smith, and that the Commonwealth knew about the testimony and failed to disclose it. The Commonwealth, however, contends that Tavares' testimony did not change, and this court agrees.

During the voir dire, Tavares testified with respect to Robinson's ability to identify the shooter based on the photo array presented to Robinson by the Boston police. Tavares testified that Robinson "was able to physically point with a hand." She further

stated that "[Robinson] just pointed [to the pictures] with his finger," and that he was capable of holding a marker, but was not holding one.

At trial, Tavares testified that Robinson, due to a condition known as "wrist drop," was unable to grasp with "fine motor movement" and, thus, could not write. She testified, however, that while the condition did not prevent him from pointing to words on a communication board, it did prevent him from writing. On cross-examination, Tavares testified that Robinson was capable of holding a marker, but could not write. She stated, "[h]e could hold it, but he couldn't – he can't write. He couldn't write with it, he could hold it." Tavares further noted that Robinson could have drawn a "very big" circle, had he been holding a marker.

Thus, at both the voir dire and trial, Tavares testified that Robinson could hold a marker, but that he could not write with it.[3] Smith's assertion of unfair surprise fails because Tavares' testimony did not change, and Smith's motion for a new trial on this point, and his motion for an evidentiary hearing, is denied.

[3] This court fails to see how the inability to hold a marker would have cast doubt on Robinson's photo identification of Smith. The evidence at trial was that Robinson identified Smith by pointing with his finger, not by using a marker. In any event, the ability to write and the ability to draw a "very big" circle are separate skills and are not inconsistent.



**ORDER**

Accordingly, it is **ORDERED** that the defendant's motion for a new trial is **DENIED**.

Elizabeth Bowen Donovan
Justice of the Superior Court

DATED: June 25, 2001

**COMMONWEALTH vs. MELVIN T. SMITH**

**[NO NUMBER IN ORIGINAL]**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

**440 Mass. 1104; 797 N.E.2d 380; 2003 Mass. LEXIS 804**

**October 3, 2003, Decided**

**PRIOR HISTORY:** [*1] Reported below: 58 Mass. App. Ct. 166, 788 N.E.2d 977 (2003).

Commonwealth v. Smith, 58 Mass. App. Ct. 166, 788 N.E.2d 977, 2003 Mass. App. LEXIS 578 (2003).

**OPINION:** *Further appellate review denied.*

(1)

Supreme Court, U.S.
FILED
MAY 12 2004
OFFICE OF THE CLERK

No. 03-8661

IN THE

# Supreme Court of the United States

OCTOBER TERM, 2003

**MELVIN T. SMITH,**
***Petitioner,***

*v.*

**COMMONWEALTH OF MASSACHUSETTS,**
***Respondent.***

***ON PETITION FOR WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS***

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS F. REILLY
*Attorney General of Massachusetts*

CATHRYN A. NEAVES*
*Assistant Attorney General*
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

**Counsel of Record*

## QUESTION PRESENTED

Whether this Court should grant certiorari to review the Massachusetts Appeals Court's decision that petitioner's Double Jeopardy rights were not implicated by the trial judge's reconsideration of her initial decision granting his motion for a required finding of not guilty as to one of the pending charges against him where: (1) there exists no important split of authority on the question presented; and (2) the Appeals Court correctly determined that petitioner's Double Jeopardy rights were not implicated?

## TABLE OF CONTENTS


QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

OPINION BELOW ..... 1

STATEMENT OF THE CASE ..... 2

1. *Procedural History* ..... 2

2. *The Facts* ..... 4

REASONS FOR DENYING THE WRIT ..... 7

I. THE APPEALS COURT'S APPLICATION OF EXISTING JURISPRUDENCE TO THIS CASE DOES NOT PRESENT AN IMPORTANT CONFLICT WITH DECISIONS OF THIS COURT, THE CIRCUIT COURTS OF APPEALS, OR ANY OF THE STATES' HIGHEST COURTS. ..... 7

II. THE APPEALS COURT CORRECTLY DETERMINED THAT PETITIONER'S DOUBLE JEOPARDY RIGHTS WERE NOT IMPLICATED BY THE TRIAL JUDGE'S RECONSIDERATION OF HER INITIAL DECISION GRANTING HIS MOTION FOR A REQUIRED FINDING OF NOT GUILTY AS TO ONE OF THE PENDING CHARGES AGAINST HIM. ..... 12

CONCLUSION ..... 13

## TABLE OF AUTHORITIES

### CASES


*Brooks* v. *State*, ..... 8
827 S.W.2d 119 (Ark. 1992)

*Commonwealth* v. *Brown*, ..... 4n
55 Mass. App. Ct. 440,
771 N.E.2d 214 (2002)

*Commonwealth* v. *Latimore*, ..... 3
378 Mass. 671,
393 N.E.2d 370 (1979)

*Commonwealth* v. *Smith*, ..... 1, 3, 4, 6, 12, 13
58 Mass. App. Ct. 166,
788 N.E.2d 977 (2003)

*Commonwealth* v. *Smith*, ..... 4
440 Mass. 1104,
797 N.E.2d 380 (2003)

*Commonwealth* v. *Sperrazza*, ..... 3
372 Mass. 667,
363 N.E.2d 673 (1977)

*Commonwealth* v. *Viglione*, ..... 9
842 A.2d 454 (Pa. 2004)

*In the Matter of Lionel F.*, ..... 9
558 N.E.2d 30 (NY 1990),
*cert. denied, Lionel v.*
*City of New York*, 498
U.S. 923 (1990)





*Lowe* v. *State*, ..... 10
744 P.2d 856 (Kan. 1987)

*People* v. *District Court*, ..... 9
663 P.2d 616 (Colo. 1983)

*People* v. *Henry*, ..... 8
789 N.E.2d 274 (Ill. 2003)

*Smalis* v. *Pennsylvania*, ..... 10
476 U.S. 140 (1986)

*State* v. *Carney*, ..... 8
374 N.W.2d 59 (Neb. 1985)

*State* v. *Hurst*, ..... 10
367 So.2d 1180 (La. 1985)
*(per curiam)*

*State* v. *Iovino*, ..... 9
524 A.2d 556 (RI 1987)

*United States* v. *Baggett*, ..... 8
251 F.3d 1087 (CA6 2001),
*cert. denied*, 534 U.S. 1167 (2002)

*United States* v. *Blount*, ..... 8
34 F.3d 865 (CA9 1994)

*United States* v. *Byrne*, ..... 8
203 F.3d 671 (CA9 2000),
*cert. denied*, 531 U.S. 1114 (2001)

*United States* v. *LoRusso*, ..... 9
695 F.2d 45 (CA2 1982),
*cert. denied*, *Errante v. United States*, 460 U.S. 1073 (1983)

*United States* v. *Martin Linen Supply*, ..... 10
430 U.S. 564 (1977)

*United States* v. *Rahman*, ..... 8-9
189 F.3d 88 (CA2),
*cert. denied*, *Nosair v. United States*, 528 U.S. 982 (1999)

*United States* v. *Washington*, ..... 9
48 F.3d 73 (CA2),
*cert. denied*, 515 U.S. 1151 (1995)

*United States* v. *Wilson*, ..... 7, 9, 10, 11, 12
420 U.S. 332 (1975)

*Washington v. United States*, ..... 11
515 U.S. 1151 (1995)

**RULES**

United States Supreme Court Rule 10 ..... 10n



IN THE

# Supreme Court of the United States

OCTOBER TERM, 2003

---

MELVIN T. SMITH,
*Petitioner*,

*v.*

COMMONWEALTH OF MASSACHUSETTS,
*Respondent.*

---

***ON PETITION FOR WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS***

---

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

The Commonwealth of Massachusetts respectfully requests that this Court deny the petition for writ of certiorari.

## OPINION BELOW

The opinion of the Massachusetts Appeals Court (the "Appeals Court") affirming both the trial court's denial of petitioner's motion for a new trial and petitioner's convictions for assault with intent to murder, assault and battery by means of a dangerous weapon, and unlawful possession of a firearm, fourth offense, is reported as *Commonwealth* v. *Smith*, 58 Mass. App. Ct. 166, 788 N.E.2d 977 (2003), and is reproduced in the Appendix to the petition.

## STATEMENT OF THE CASE

### 1. *Procedural History*

Petitioner seeks a writ of certiorari to the Appeals Court to review its decision, in affirming his conviction for unlawful possession of a firearm, that the trial court correctly denied his motion for a new trial, on the ground that the trial judge violated his Double Jeopardy rights when she reconsidered her initial grant of a motion for required finding of not guilty as to that charge.[1] On September 26, 1996, a Suffolk County grand jury indicted petitioner for armed assault with intent to murder and assault and battery by means of a dangerous weapon. On October 8, 1998, a Suffolk County grand jury indicted petitioner of unlawful possession of a firearm (fourth offense).

Petitioner's trial before a jury (Donovan, J., presiding) began on November 4, 1998. After the Commonwealth rested:

> [petitioner] moved for a required finding of not guilty on the charge of unlawful possession of a firearm, arguing that because the Commonwealth had not introduced direct evidence of the gun's length, the Commonwealth had not proved that the gun met the statutory definition of a firearm. The judge allowed the motion. The allowance of the motion was not communicated to the jury, but it was recorded on the docket.
>
> Later that day, after the defense had rested and before closing argument, the Commonwealth called the judge's attention to *Commonwealth v. Sperrazza*, 372 Mass. 667, 670, 363 N.E.2d 673 (1977), in which the Supreme Judicial Court held that testimony that a gun was a pistol or revolver was sufficient evidence to permit a firearm charge to go to the jury. In light of the case law, the trial judge concluded that the Commonwealth had, in fact, met the [*Commonwealth v.*] *Latimore*, [378 Mass. 671, 677-78, 393 N.E.2d 370 (1979)] standard because the Commonwealth had introduced testimony that the gun was a "pistol" and that it was a ".32 or .38," from which a jury could infer that the gun was less than sixteen inches. The judge decided to submit the charge to the jury. The docket reflects that the motion for required finding of not guilty had been reconsidered and was denied.

*Commonwealth v. Smith*, 58 Mass. App. Ct. at 169, 788 N.E.2d at 981-82.

On November 16, 1998, the jury convicted petitioner of all counts. Petitioner waived a jury trial on the fourth offense aspect of the firearm charge, and the court convicted him after hearing the evidence. The trial judge sentenced petitioner to twelve to fifteen years for his conviction for armed assault with intent to murder, to a concurrent nine to ten years for his conviction for assault and battery with a dangerous weapon, and to a concurrent ten to twelve years for the firearm charge.[2]

On February 14, 2001, petitioner filed a motion for new trial, asserting (among other matters) that his Double Jeopardy

---

[1]Petitioner made no such motion for required finding as to the Commonwealth's proof as to his indictments for assault with intent to murder and assault and battery by means of a dangerous weapon. As such, the Petition does not concern the Appeals Court's bases for those convictions.



[2]Given the facts of petitioner's crimes, *see infra* at 4-6, as well as the manner of his sentencing, the Commonwealth respectfully takes issue with his current characterization of his firearm charge as being the "primary offense." *See* Petition, at 6.

rights were violated by the trial judge's reconsideration of her initial grant of his motion for a required finding as to the firearm charge. The trial court (Donovan, J.) denied the motion in a June 27, 2001 memorandum and order, determining that no such violation occurred where petitioner was not subjected to a second trial, the court's error was corrected before closing arguments, and petitioner had the option to re-open his case. The trial court's memorandum and order is reproduced in the Appendix to the petition.

The Appeals Court affirmed both the trial court's denial of petitioner's motion for new trial and petitioner's convictions on May 21, 2003, *Commonwealth v. Smith*, 58 Mass. App. Ct. 166, 788 N.E.2d 977 (2003), and the Massachusetts Supreme Judicial Court denied petitioner's application for leave to obtain further appellate review on October 3, 2003. *Commonwealth v. Smith*, 440 Mass. 1104, 797 N.E.2d 380 (2003).

On December 31, 2003, petitioner filed a petition with this Court seeking a writ of certiorari.

## 2. *The Facts*

The Appeals Court made the following detailed findings of fact relating to petitioner's crimes:

Co-defendant Felicia Brown lived with her mother, stepfather, and two siblings in a three-story building at 33 Lawn Street, in the Jamaica Plain section of Boston.[3] The Brown

---

[3]The Appeals Court added the following in a footnote:

Brown was indicted on charges of being an accessory after the fact and perjury. The perjury indictment was severed. Brown was tried with [petitioner] on the accessory after the fact indictment and was acquitted. Following a separate trial, Brown was convicted on the perjury charge; the conviction was later reversed by this court. *Commonwealth v. Brown*, 55 Mass. App. Ct. 440, 771 N.E.2d 214 (2002).



family occupied part of the second floor of the building and all of the third floor, and rented part of the secnd floor and all of the first floor to tenants.[4]

On August 15, 1996, Christopher Robinson, Brown's cousin, spent the day sitting around the house, drinking alcohol, and smoking marijuana and crack cocaine. At approximately 4:00 A.M., Robinson went from the third floor to the second floor downstairs to lie down. When he reached the bottom of the stairs, he saw Brown and [petitioner] in Brown's bedroom. [Petitioner] was holding what appeared to be a .32 or .38 caliber pistol.

Robinson testified that as he descended from the third to the second floor, [petitioner] shot him three times. [Petitioner] said to Brown, "let's go." Robinson said, "I know who you are, Melvin. Why you shoot me? I know who you are. Your name is Melvin."[5]

Brown and [petitioner] left the house. Robinson sought help from Brown's stepfather, who telephoned the police. The police and paramedics arrived within moments of each other.

While the paramedics attended to Robinson, Boston police Officer Wayne Clark asked Robinson who shot him. Robinson answered, "Melvin." Officer Clark asked for a last name, but Robinson said he did not know it. Officer Clark asked

---

[4]The Appeals Court added the following in a footnote:

Patrick Veridieu lived in the first floor apartment and Elaine Shaw lived in the second floor apartment.

[5]The Appeals Court added the following in a footnote:

Immediately after the shooting, Robinson told the police that he did not know Melvin's last name. At trial, however, Robinson testified that Brown had said, "His last name is Smith," as she left the house.

Robinson how he knew Melvin, and Robinson told him that Melvin was his cousin's boyfriend.

The shooting severely injured Robinson and destroyed his digestive tract. While in the hospital, Robinson selected a photograph of [petitioner] from a photographic array and identified [petitioner] as the person who shot him. At trial, Robinson identified [petitioner] as his assailant.

On August 25, 1996, Boston police Detective Tony Smith interviewed Brown in the presence of her mother. Brown said that she and [petitioner] had left because Robinson had been acting crazy and "busting up" the house. Brown told Detective Smith that at the time of the shooting, [petitioner] was in his car and that she had just approached the house. She said that she heard the gunshots as she walked to the door, and that she and [petitioner] drove away, to "Tony's." Brown cried during the interview and explained that she was under a lot of pressure. She said that she and [petitioner] went to a friend's house to use the phone.

The theory of the defense was that Robinson was too intoxicated by drugs and alcohol to correctly identify his assailant and that one of the tenants in the building, Patrick Veridieu, had a motive and an opportunity to shoot him.

*Commonwealth v. Smith*, 58 Mass. App. Ct. at 167-69, 788 N.E.2d at 980-81.



## REASONS FOR DENYING THE WRIT

### I. THE APPEALS COURT'S APPLICATION OF EXISTING JURISPRUDENCE TO THIS CASE DOES NOT PRESENT AN IMPORTANT CONFLICT WITH DECISIONS OF THIS COURT, THE CIRCUIT COURTS OF APPEALS, OR ANY OF THE STATE'S HIGHEST COURTS.

Despite petitioner's contentions to the contrary, a review of the Appeals Court's decision in light of existing precedent does not present this Court with an important split of authority among the decisions of this Court, the circuit courts of appeals, or the states' highest courts. As this Court explained in *United States v. Wilson*, permitting the government to *appeal* all acquittals presents the following concerns that the Double Jeopardy Clause is intended to protect against: (1) it would permit the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; (2) it would permit the prosecutor to re-examine the weaknesses in his first presentation of the evidence in order to strengthen a second; and (3) it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal. 420 U.S. 332, 352 (1975). This Court noted, however, that:

> Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.

*Id.* at 345.

The Appeals Court in this case, along with most of the circuit courts of appeals and state's highest courts, have recognized this distinction and tension in analyzing the particular facts and circumstances of each case in which a trial court reconsidered an initial decision granting, or favorably considering, a motion for required finding of not guilty. Indeed, most of these courts have focused essentially on whether any one of the three concerns noted by this Court in *Wilson* is in play before deciding whether the Double Jeopardy Clause is implicated. Among those that have followed this well-worn path, some have concluded that the facts and circumstances demonstrated a Double Jeopardy violation. *United States v. Blount*, 34 F.3d 865, 868 (CA9 1994) (trial judge granted motion for required finding and informed the jury; jeopardy ended upon that announcement); *People v. Henry*, 789 N.E.2d 274, 285-86 (Ill. 2003) (based upon judge's action in "vacating" rather than "reconsidering" ruling which granted motion for directed verdict, Double Jeopardy precluded submitting charge to jury); *Brooks v. State*, 827 S.W.2d 119, 123 (Ark. 1992) (noting prejudice to defendant's ability to present defense, Double Jeopardy violated when judge reversed prior grant of a motion for directed verdict just before jury charge and charged jury on offense); *State v. Carney*, 374 N.W.2d 59, 61 (Neb. 1985) (Double Jeopardy violated where government allowed set aside its "rest" and adduce more evidence of defendant's guilt after motion for required finding of not guilty granted).

Others have concluded that the facts and circumstances did not warrant a conclusion that Double Jeopardy was implicated. *United States v. Baggett*, 251 F.3d 1087, 1095 (CA6 2001) (oral grant of motion outside jury's presence does not terminate jeopardy), *cert. denied*, 534 U.S. 1167 (2002); *United States v. Byrne*, 203 F.3d 671, 674 (CA9 2000) (motion for required finding granted outside jury's presence not final; reconsideration allowed before further proceedings commenced), *cert. denied*, 531 U.S. 1114 (2001); *United States v. Rahman*, 189



F.3d 88, 133-34 (CA2) (no violation where proceedings concerning motion for required finding and its reconsideration took place outside jury's presence; defendant lost no opportunity to offer further evidence); *cert. denied, Nosair v. United States*, 528 U.S. 982 (1999); *United States v. Washington*, 48 F.3d 73, 79 (CA2) (no violation where motion granted outside jury's presence and judge reversed decision after further proceedings), *cert. denied*, 515 U.S. 1151 (1995); *United States v. LoRusso*, 695 F.2d 45, 54 (CA2 1982) (because jury not dismissed and no judgment entered, oral grant of motion for required finding which was later reversed did not implicate Double Jeopardy), *cert. denied*, *Errante v. United States*, 460 U.S. 1070 (1983); *Commonwealth v. Viglione*, 842 A.2d 454, 468 (Pa. 2004) (no constitutional violation where reconsideration occurred immediately, government did not re-open its case, defendant not subjected to "harassment or uncertainty"); *In the Matter of Lionel F.*, 558 N.E.2d 30, 31 (NY 1990) (no violation where reconsideration of oral grant of motion occurred after defendant rested without calling witnesses), *cert. denied*, *Lionel F. v. City of New York*, 498 U.S. 923 (1990); *State v. Iovino*, 524 A.2d 556, 560 (RI 1987) (no violation where, after judge reconsidered his allowance of motion for required finding, he offered defendant opportunity to present additional testimony, which defendant declined); *People v. District Court*, 663 P.2d 616, 621 (Colo. 1983) (no violation where order and reconsideration occurred outside jury presence, no additional governmental attempt to convict defendant, and defendant not detrimentally affected in presenting a defense by the court's reconsideration).

As the Second Circuit aptly noted in *United States v. LoRusso*: "[t]hese protections have been viewed in a commonsense fashion, and 'where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended.'" 695 F.2d at 53, quoting *United States v. Wilson*, 420 U.S. at 344. Only by abandoning commonsense and, in one case, by focusing on dicta in this

Court's decision in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986) have a few outlier courts determined that a motion judge's reconsideration of allowance of a motion for a required finding of not guilty--when neither the initial decision nor the reconsideration was communicated to the jury, the government presented no further evidence against the defendant, and the defendant suffered no prejudice to his defense--violated Double Jeopardy. *See Lowe v. State*, 744 P.2d 856, 858 (Kan. 1987) (citing dicta in *Smalis* and holding that reconsideration of such a motion violated Double Jeopardy even if no further evidence adduced by prosecution); *State v. Hurst*, 367 So.2d 1180, 1180-81 (La. 1979) (*per curiam*) (jeopardy ended the moment motion for required finding was granted). This Court's holding in *Smalis*, that the government could not *appeal* an entry of acquittal, however, was an unremarkable application of its well-established Double Jeopardy jurisprudence and certainly did not, as petitioner contends, call into question its decision in *United States v. Wilson*. *Smalis v. Pennsylvania*, 476 U.S. at 145.

What petitioner focuses on instead is the Court's dicta in *Smalis*, which of course must be read in light of the particular facts presented in that case: "the Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.'" *Id.* at 145-46, quoting *United States v. Martin Linen Supply*, 430 U.S. 564, 570 (1977).[6] The Court was faced with a unique procedure in Pennsylvania by which a successful appeal of an acquittal would result in a return of the matter to the same finder of fact. *Id.* at 144-45. Simply put, even the Court's dicta in *Smalis* does not tend to disapprove of a trial court's

[6]Petitioner's citations to the decisions by various intermediate state appellate courts add little to the question of whether a conflict exists. SUP. CT. R. 10.



reconsideration of an initial ruling allowing a motion for directed verdict, assuming that the three core concerns noted in *Wilson* are not in issue.

A review of the above-cited decisions in this area demonstrates that the particular decision reached depends upon the facts and circumstances of each individual case, based upon the court's assessment of whether one of the three *Wilson* factors that bear on the Double Jeopardy question is at issue or whether a defendant simply is attempting to benefit from an error of law that could be corrected without subjecting him to a second proceeding. *United States v. Wilson*, 420 U.S. at 345. Indeed, it is noteworthy that the Court denied a petition seeking a writ of certiorari in a case presenting facts very close to those extant in this case: the Second Circuit held that no Double Jeopardy concerns were implicated where the trial judge granted a motion for required finding outside the jury's presence and expressly declined to inform the jury that the motion was granted; the trial resumed; and the trial judge reversed his decision shortly thereafter. *Washington v. United States*, 515 U.S. 1151 (1995). As discussed below, using the lens which the Court provided in *Wilson*, the Appeals Court saw its way clear to a commonsense and correct conclusion that petitioner's Double Jeopardy rights were not implicated by the trial judge's reconsideration of her initial grant of his motion for required finding of not guilty. The petition seeking a writ of certiorari should be denied.

## II. THE APPEALS COURT CORRECTLY DETERMINED THAT PETITIONER'S DOUBLE JEOPARDY RIGHTS WERE NOT IMPLICATED BY THE TRIAL JUDGE'S RECONSIDERATION OF HER INITIAL DECISION GRANTING HIS MOTION FOR A REQUIRED FINDING OF NOT GUILTY AS TO ONE OF THE PENDING CHARGES AGAINST HIM.

The Appeals Court correctly applied this Court's existing precedent in reaching its conclusion that petitioner's Double Jeopardy rights were not implicated by the trial judge's reconsideration of her initial decision to grant his motion for a required finding of not guilty. It first noted that "double jeopardy protections were not violated in these circumstances because the judge's correction of her ruling did not require a second proceeding." *Commonwealth v. Smith*, 58 Mass. App. Ct. at 170, 788 N.E.2d at 982; *see United States v. Wilson*, 420 U.S. at 335, 344 ("the constitutional restriction on governmental appeals is intended solely to protect against exposing the defendant to multiple trials, not to shield every determination favorable to the defendant from appellate review[;]" "where there is no risk of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended."). The Appeals Court went on to quote *Wilson*, noting that, indeed, finding a Double Jeopardy violation based upon the facts of this case would grant petitioner an unwarranted benefit. *Id.* at 170, 788 N.E.2d at 982. The court went on to elucidate what facts and circumstances presented in this particular case warranted such a conclusion. It pointed out that "[t]he defendant has not suggested that the initial allowance of the motion affected his trial strategy with regard to



the other charges." *Id.* at 171, 788 N.E.2d at 983.[7] The Appeals Court highlighted the significant facts that the Commonwealth did not present any additional evidence and that petitioner had the option to re-open his case. *Id.*, 788 N.E.2d at 983. Finally, it noted both that the evidence against petitioner on the firearm charge was not insufficient as a matter of law and that petitioner was not prejudiced by the ruling since the jury was not informed of either the initial ruling or the reconsideration. *Id.*, 788 N.E.2d at 983. The Court should deny the petition seeking a writ of certiorari.

## CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

THOMAS F. REILLY
*Attorney General of Massachusetts*

CATHRYN A. NEAVES*
*Assistant Attorney General*
One Ashburton Place
Boston, Massachusetts, 02108
(617) 727-2200

**Counsel of Record*

May 12, 2004

---

[7]Neither did petitioner present in his brief to the Appeals Court any argument that he might have changed his strategy as to the firearm charge. As such, this Court should disregard petitioner's argument to that effect, *see* Petition, at 7, where it is being made for the first time here.

ORIGINAL

Supreme Court, U.S.
FILED
JUN - 4 2004
OFFICE OF THE CLERK

DISTRIBUTED
JUN 10 2004

No. 03-8661

# In The
# Supreme Court of the United States
## October Term, 2004

Melvin T. Smith,
*petitioner*

v.

Commonwealth of Massachusetts,
*respondent*

**On Petition for Writ of Certiorari**
**to the Appeals Court of the Commonwealth of Massachusetts**

## Petitioner's Brief in Reply to Respondent's Opposition to Petition for Writ of Certiorari

Counsel of Record for Petitioner:

David Nathanson
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108
617-988-8309
dnathanson@publiccounsel.net

## TABLE OF CONTENTS


| | Page |
|---|---|
| **Table of contents** | i |
| **Table of authorities** | ii |
| **Argument** | 1 |
| **I. The government argues that no double jeopardy violation occurred because the judge's reconsideration of her finding of not guilty did not subject Smith to a second trial before a second fact-finder. As a matter of law, Arizona v. Rumsey indicates otherwise. As a matter of fact, there were additional prohibited fact-finding proceedings after the judge declared Smith to be not guilty. This unconstitutionally placed Smith twice in jeopardy.** | 1 |
| **II. There is a split of authorities among the lower courts on this important question.** | 3 |
| **Conclusion** | 4 |

**Table Of Authorities**


| Cases | Page |
|---|---|
| Arizona v. Rumsey, 467 U.S. 203 (1984) | 2-3 |
| In re Winship, 397 U.S. 358 (1970) | 3 |
| Jackson v. Virginia, 443 U.S. 307 (1979) | 3 |
| Price v. Vincent, 538 U.S. 634, 123 S. Ct. 1848, 155 L. Ed. 2d 877 (2003) | 3 |
| Ring v. Arizona, 536 U S. 584 (2002) | 2 |
| Sanabria v. United States, 437 U.S. 54 (1978) | 2, 3 |
| United States v. Wilson, 420 U.S. 332 (1975) | 2 |

**Constitutional Provisions**

U.S. Const. Art. V ..... passim

**Miscellaneous**

http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-524.pdf (visited December 29, 2003) ..... 4




**No. 03-8661**

**In The**

**Supreme Court of the United States**

**October Term, 2003**

Melvin T. Smith,

*petitioner*

v.

Commonwealth of Massachusetts,

*respondent*

**On Petition for Writ of Certiorari to the Appeals Court of the Commonwealth of Massachusetts**

**Petitioner's Brief in Reply to Respondent's Opposition to Petition for Writ of Certiorari**

The questions presented, citations to the opinions below, statement of jurisdiction, constitutional and statutory provisions involved in this case, concise statement of the case, and reasons for granting the petition are all set out in Smith's petition for certiorari.

**Argument**

**I. The government argues that no double jeopardy violation occurred because the judge's reconsideration of her finding of not guilty did not subject Smith to a second trial before a second fact-finder. As a matter of law, Arizona v. Rumsey indicates otherwise. As a matter of fact, there were additional prohibited fact-finding proceedings after the judge declared Smith to be not guilty. This unconstitutionally placed Smith twice in jeopardy.**

The government and the Massachusetts Appeals Court cling to the theory that no double jeopardy violation occurred in Smith's case because the judge's

entry of a verdict of not guilty at the close of the government's case "could be corrected without subjecting him to a second trial before a second trier of fact."[1]

First, the government's position is wrong as a matter of law. This Court rejected a closely related argument in Arizona v. Rumsey.[2] There, the trial judge was the sole trier of fact for Rumsey's death penalty sentencing hearing.[3] Due to a purely legal error, the trial judge rejected the death penalty and sentenced Rumsey to life in prison. The conviction was appealed. The appellate court noted the legal error, affirmed the conviction of capital murder but remanded for a new sentencing hearing.[4] No new evidence was presented on remand, only legal arguments were heard before the same judge.[5] Nevertheless, this Court held that the prohibition against double jeopardy barred any further proceedings.[6] So too, in Smith's case, the judge's unequivocal finding of not guilty barred further proceedings including "reconsideration" and submission of the indictment to the jury. Under Rumsey, this is so regardless of whether either party presented additional evidence on that charge. (The tenor of the earlier, more factually convoluted case of Sanabria v. United States[7] also supports this conclusion.)

Second, the government's position is wrong as a matter of fact. There were additional fact-finding in Smith's case after the judge granted and then reconsidered her finding of not guilty. After the judge ruled (twice) on the question of whether a reasonable jury could conclude beyond a reasonable doubt

[1] Resp. Opp. at 12-13; App. 3a (quoting United States v. Wilson, 420 U.S. 332, 345 (1975)).
[2] Arizona v. Rumsey, 467 U.S. 203, 211 (1984).
[3] Rumsey, 467 U.S. at 205; but see Ring v. Arizona, 536 U.S. 584 (2002).
[4] Rumsey, 467 U.S. at 206-207.
[5] Rumsey, 467 U.S. at 207.
[6] Rumsey, 467 U.S. at 211.



that the Commonwealth had proven each element beyond a reasonable doubt,[8] a second fact-finder (the jury) continued on to consider the defendant's case and make the distinct factual determination of whether they believed that the Commonwealth had *actually* proven each element beyond a reasonable doubt.[9] Those are further fact-finding proceedings, barred by the prohibition against double jeopardy.

## II. There is a split of authorities among the lower courts on this important question.

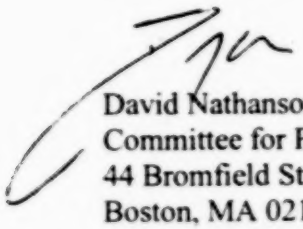
The government contends that Smith's case is not appropriate for certiorari because there is no split of authorities among the lower courts.[10] But, the government then goes on to recount the split,[11] as Smith did in his petition.[12] No matter how the government characterizes it, it has essentially admitted that there is a split of authorities on this important question. That position is well taken, given that this Court recently granted certiorari in Price v Vincent,[13] a case presenting a nearly identical issue. But the Court was unfortunately unable to reach the substantive question in Vincent because of that case's procedural complications.[14] Where Vincent did not reach the issue, the issue is assuredly just as important and as uncertain today as it was one year ago when the Court decided Vincent.[15]

[7] Sanabria v. United States, 437 U.S. 54, 69 (1978).
[8] Jackson v. Virginia, 443 U.S. 307 (1979).
[9] In re Winship, 397 U.S. 358, 361 (1970).
[10] Resp. Opp. at 7.
[11] Resp. Opp. at 8-10.
[12] Pet. for Cert. at 7-8.
[13] Price v. Vincent, 538 U.S. 634, 123 S. Ct. 1848, 1854-55, 155 L. Ed. 2d 877 (2003).
[14] Vincent, 123 S. Ct. at 1854-55.
[15] http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-524.pdf (visited December 29, 2003).

## Conclusion

This Court should grant the defendant's petition for a writ of certiorari.

Respectfully submitted,



David Nathanson
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108
617-988-8309
dnathanson@publiccounsel.net

Date: June 4, 2003

No. 03-8661

In The
# Supreme Court of the United States

MELVIN T. SMITH,

*Petitioner,*

v.

COMMONWEALTH OF MASSACHUSETTS,

*Respondent.*

**On Writ Of Certiorari To The Appeals Court Of The Commonwealth Of Massachusetts**

## JOINT APPENDIX


DAVID NATHANSON*
Committee for Public Counsel Services
44 Bromfield Street
Boston, Massachusetts 02108
Telephone: (617) 482-6212
Facsimile: (617) 988-8455
*Counsel for Petitioner*

THOMAS F. REILLY
Attorney General Of Massachusetts

CATHRYN A. NEAVES*
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
Telephone: (617) 727-2200
Facsimile: (617) 727-5755
*Counsel for Respondent*

**Counsel of Record*



**Petition for Certiorari Filed December 31, 2003**
**Certiorari Granted June 14, 2004**

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

# JOINT APPENDIX
# TABLE OF CONTENTS

Page

Docket sheets for SUCR1998-11521 ..... 1

Indictment for SUCR1998-11521 ..... 9

Transcript excerpts

a. Tr. 2:67-68, 108-109 ..... 11

b. Tr. 3:55 ..... 16

c. Tr. 6:63-125, 204-206 ..... 18

d. Tr. 7:7-19 ..... 80

e. Tr. 8:6-7, 14-16, 83, 96 ..... 91

Motion for required finding of not guilty ..... 98

Verdict Slip ..... 102

Decision of the Suffolk County Superior Court on Smith's motion for new trial ..... 103

Portion of Smith's principal brief to the Massachusetts Appeals Court ..... 113

Portion of Smith's reply brief to the Massachusetts Appeals Court ..... 116

*Commonwealth v. Smith*, 58 Mass. App. Ct. 166, 788 N.E.2d 977 (2003) ..... 120

## DOCKET ENTRIES

### Commonwealth of Massachusetts
### SUFFOLK SUPERIOR COURT

| Entry Date: | Paper No: | Docket Entry: |
|---|---|---|
| 10/06/1998 | | Case opened to issue docket# to grand jury |
| 10/08/1998 | 1 | Indictment returned |
| 10/08/1998 | 2 | Motion by Commonwealth for arrest warrant to issue; filed & allowed (Carol S Ball, Justice) |
| 10/08/1998 | | Warrant on indictment issued via WMS |
| 11/03/1998 | | Brought into Court-warrant recalled via WMS. |
| 11/03/1998 | | Appointment of Counsel Carroll |
| 11/03/1998 | | Deft arraigned before Court |
| 11/03/1998 | | Deft waives reading of indictment |
| 11/03/1998 | | RE offense 1: Plea of not guilty |
| 11/03/1998 | | Deft released on personal recognizancein [sic] the amount of $100. |
| 11/03/1998 | | Commonwealth moves for trial with Indictment #96-11471, Offenses 001 and 002. The Court, Donovan, RAJ orders jury of fourteen (14) members impanelled [sic]. Jury impanelled [sic] but not sworn. Jury allowed to separate and |

| | |
|---|---|
| | reconvene on November 4, 1998. Donovan, RAJ – J. Puleo, ADA – M. McDonald, Court Reporter – B. Carroll, Attorney. |
| 11/04/1998 | Brought into Court. Jury of fourteen (14) members sworn for trial with Indictment #96-11471, Offenses 001 and 002. Trial commences. |
| 11/04/1998 | Defendant's oral motion for Mistrial made and after hearing, denied. |
| 11/04/1998 | Jury allowed to separate and reconvene on Thursday, November 5, 1998 at 9:00 A.M. Donovan, J. – J. Puleo, ADA – M. McDonald, Court Reporter – B. Carroll, Attorney |
| 11/05/1998 | Brought into Court. Trial continues. Jury allowed to separate and reconvene on Monday, November 9, 1998 at 9:00 A.M. Donovan, RAJ – J. Puleo, ADA – M. McDonald, Court Reporter – B. Carroll, Attorney |
| 11/09/1998 | Brought into Court. Trial continues. |
| 11/10/1998 | Brought into Court. Trial continues. |
| 11/10/1998 | Deft files Proposed Jury Instructions (Paper #43 in 96-11471) M. McDonald, Court Reporter |



| | | |
|---|---|---|
| 11/12/1998 | | Brought into Court. Trial continues. Commonwealth rests it's case in chief. |
| 11/12/1998 | 3 | Deft files Motion for Required Finding. |
| 11/12/1998 | | Motion (P#3) allowed after hearing. |
| 11/12/1998 | | Motion (P#3) after hearing re: reconsideration of the Court's ruling, the Court orders Motion for Required Finding be denied. Defendant rests it's case in chief. Defendant's Motion for Required Finding of Not Guilty orally renewed. After hearing, denied. |
| 11/12/1998 | | Jury reduced to twelve in number and the names of Stephen Collins (Juror #12-06) and Scott Blanchette (Juror #12-08) were drawn and designated as alternate jurors to be kept separate and apart. Jury deliberations commence. Jury allowed to separate and reconvene on Friday, November 13, 1998. Donovan, RAJ – J. Puleo, ADA – M. McDonald, Court Reporter – B. Carroll, Attorney. |
| 11/13/1998 | | Brought into Court. Jury deliberations resume. Reconsideration of motion #3 after hearing taken under advisement. Jury allowed to separate and reconvene on Monday, |

| | | |
|---|---|---|
| | | November 16, 1998 at 9:00A.M. M. McDonald, Court Reporter. |
| 11/16/1998 | | Brought into Court – reconsideration of motion #3 denied. Jury resumes deliberation. Question received from jury and marked "G" for identification. Question received from jury and marked "H" for identification. |
| 11/16/1998 | | RE offense 1: Guilty verdict as to |
| 11/16/1998 | 4 | Verdict Affirmed. Verdict Slip filed. Commonwealth moves for trial as to fourth and subsequent offense. |
| 11/16/1998 | 5 | Waiver of trial by jury filded [sic]. After colloquy of defant [sic] – Trial before Donovan, RAJ without jury. |
| 11/16/1998 | | Finding of guilty (Elizabeth B Donovan, Justice) Commonwealth moves for sentencing. |
| 11/16/1998 | | Sentence imposed: M.C.I. Cedar Junction Max. 12 Years – Min. 10 Years, concurrent with sentence imposed on 96-11471 offense #001. |
| 11/16/1998 | | Notified of right of appeal under Rule 64 |
| 11/16/1998 | | Notified of right of appeal under Rule 65 |
| 11/16/1998 | | Sentence credit given as per 279:33A: 807 days. |



| | | |
|---|---|---|
| 11/16/1998 | | Notice of appeal filed. (Paper #48 in 96-11471) |
| 11/16/1998 | | Motion to withdraw and appointment of successor counsel filed. (Paper #49 in 96-11471) |
| 11/16/1998 | | Motion (P#49 filed in 96-114710) allowed except as to Appellate Division. Committee for Public Counsel Services appointed to represent defendant for appeal purposes. Donovan, RAJ – J. Puleo, ADA – M. McDonald, Court Reporter – B. Carroll, Attorney. |
| 01/25/1999 | 6 | Deft files motion for free transcripts. |
| 01/29/1999 | | Copy of notice of appeal mailed to Donovan, J and J.Puleo, ADA Letter sent to Court Reporter M.McDonald Re: Transcripts of November 3,4,5,9,10,12,13,16,1998 for trial – verdict – disposition before Donovan,J.Certificate of Clerk – filed.#50 in 96-11471) |
| 04/10/2000 | | Transcript of testimony received from M.McDonald, Court Reporter. |
| 04/24/2000 | | Transcript of testimony received from M.McDonald, Court Reporter. |
| 05/04/2000 | | Transcript of testimony received from M.McDonald, Court Reporter. |

| | | |
|---|---|---|
| 06/05/2000 | | Transcript of testimony received from M.McDonald, Court Reporter. |
| 06/29/2000 | | Notice sent to attorneys that transcripts are available. |
| 07/07/2000 | | Certificate of delivery of transcript by clerk – filed. Paper # 51 in 96-11471. |
| 07/20/2000 | | Certificate of delivery of transcript by clerk – filed. Paper # 52 in 96-11471. |
| 07/24/2000 | | Notice of completion of assembly of record sent to Appeals Court and attorney for commonwealth and defendant. |
| 07/24/2000 | | Two certified copies of docket entries, original and copy of transcript, two copies of exhibit list and list of documents #48, each transmitted to clerk of Appellate Court. |
| 07/25/2000 | 7 | Notice of docket entry received from the Appeals Court, Filed. |
| 02/14/2001 | 8 | Deft files motion for discovery, evidentiary hearing and issuance of indigent summonses. (Donovan, J. & J. Sullivan, ADA notified 3/2/01) |
| 02/14/2001 | 9 | Deft files motion for leave to file an amended motion for a new trial affidavit of Attorney Nathanson. (Donovan, J. & J. Sullivan, ADA notified 3/2/01) |



| | | |
|---|---|---|
| 02/14/2001 | 10 | Deft files motion for a new trial and for relief from unlawful restraint & memorandum in support of. (Donovan, J. & J. Sullivan, ADA notified 3/2/01) |
| 02/27/2001 | 11 | Deft files notice of appearance and statement of opposition to defendant's motion for nre [sic] trial. |
| 03/08/2001 | | P#56 endorsed thereon: "motion to amend is allowed. The Commonwealth shall file its written response to all motions within 45 days of the filing of the amended motion." Donovan, J (filed in case no. 1996-11471 – notice on same) |
| 04/02/2001 | 12 | Deft files amended motion for a new trial and amended memorandum in support of motion for new trial with affidavit of Attorney David Nathanson & affidavit of motion. (Paper No. 59 in 96-11471). |
| 04/20/2001 | | Copy of Defendant's Motion Paper # 59 in 96-11471 endorsed thereon 4-13-01. Motion to release from restrain[t] is denied. The Commonwealth has 45 days to file respone [sic] to the motion for new trial. Donovan, J. |
| 05/09/2001 | | Notice of appeal, filed. (Paper No. 60 in 96-11471) |
| 05/22/2001 | | Copy of notice of appeal mailed to Donovan, J and J.Ditkoff, ADA |

| | | |
|---|---|---|
| 05/29/2001 | 13 | Commonwealth files opposition to defendant's amended motion for new trial. (Paper #61 filed in 96-11471) |
| 06/27/2001 | | Memorandum of Decision and Order on defendant's motion for new trial, denied. Donovan, J. (Paper No. 63 in 96-11471) |
| 07/16/2001 | | Deft files: Notice of appeal as to the denial of his motion for new trial. (Paper #64 in 96-11471) |
| 07/27/2001 | | Notice of docket entry recived [sic] from Appeals Court – Stay is vacated – |
| 07/27/2001 | | Appeal from denial of New trial Motion is consolidated with the pending appeal without need for further assembly. Suffolk Superior Criminal Court to transmit updated docket sheets forthwith. |
| 08/01/2001 | | Copy of #65 and updated docket sheets transmitted to Clerk of Appeals Court. |
| 10/20/2003 | 14 | Rescript received from Appeals Court; "Judgment AFFIRMED. Order denying Motion for new trial afformed [sic]." filed. |



**Possession Of Firearm, Not Home/Work, No License**
**INDICTMENT** **C. 269, § 10(a)**
**98-11521-001** **Fourth Offense**

***Commonwealth of Massachusetts***

SUFFOLK, SS.

At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS, begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of October in the year of our Lord one thousand nine hundred and ninety-eight.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

**MELVIN SMITH,**

on August 16, 1996, did unlawfully, knowingly have in his possession, a firearm, to wit: a handgun, from which a bullet could be discharged, the length of the barrel of said firearm being less than sixteen inches, the said Melvin Smith not being present in his residence or place of business and without having in effect a license to carry firearms issued under § 31 or § 131F of c. 140 of the General Laws of Massachusetts and without complying with the provisions of § 129(c) and § 131(g) of said c. 140.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

**MELVIN SMITH,**

on November 5, 1990, prior to the commission of the offense heretofore described in this indictment was convicted in the Suffolk Superior Court of the offense of

Unlawful Carrying Of Firearm, Docket # 090967, and this is therefore a second and subsequent such offense;

on November 5, 1990, prior to the commission of the offense heretofore described in this indictment was convicted in the Suffolk Superior Court of the offense of Unlawful Carrying Of Firearm, Docket #086496, and this is therefore a third and subsequent such offense;

on July 20, 1995, prior to the commission of the offense heretofore described in this indictment was convicted in the United States District Court of Massachusetts of the offense of Felon In Possession Of Firearm, Docket #95-10032-JLT, and this is therefore a fourth and subsequent such offense.

A TRUE BILL

/s/ John P. Puleo
*Assistant District Attorney*

/s/ [Illegible]
*Foreman of the Grand Jury*

*Superior Court Department-Criminal Business*
*October, Sitting, 1998*

*Returned into said Superior Court by the Grand Jurors and ordered to be filed.*

/s/ John A. Nucci
*Clerk Of Court*

---



COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 96-11471, 98-11521
96-11797

COMMONWEALTH OF MASSACHUSETTS

v.

MELVIN T. SMITH (SUCR97-11471 and SUCR98-11521)
FELICIA BROWN (SUCR96-11797)

---

November 4, 1998
Before: Donovan, J.
Boston, Massachusetts
Day 2 – Trial

* * *

[Witness Christopher Robinson]

[67] second floor?

A Yes, sir.

Q All right. And what was your purpose in going down to the second floor?

A I was going into Tyrone's room.

Q And what were you going to do there?

A I was going to lie down.

Q Up to this point, had you had an argument with anybody in that home that evening?

MR. CARROLL: Objection.

THE COURT: Sustained.

A No, sir.

MR. CARROLL: Move to strike.

THE COURT: That may go out.

Q Were you having problems with anyone in the house at that time?

MR. CARROLL: Objection.

THE COURT: Sustained.

Q So what happened, sir, when you went down the stairs?

A As I approached – when I got to the last stair, the end of the staircase, to my left is Felicia's room. And I turned and I saw Melvin and Felicia standing at the end of her bed, and Melvin had a gun in his hand.

Q What kind of gun?

[68] A A pistol. It appeared to be a .32 or a .38.

Q So what happened?

A He started to fire.

Q Where was the gun pointed when he started to fire?

A About – at his waist, going up to his waist with his right hand.

Q And what happened to you?

A I just stood there. And I heard three shots. And after that, I heard nothing else. It was just like a ringing in my ears, a continuous ringing. I went into Tyrone's room as they passed through the door. As he finished



shooting, he said, "Let's go," and they left and slammed the door.

Q How much time was there between the first shot and the second shot?

A Continuously.

Q And the second and the third also?

A Yes, sir.

Q And where exactly were you at physically when Melvin shot you?

A In the hallway.

Q And again, referencing that chart, in the hallway, what were you close to? What part of that hallway were you in?

* * *

[108] THE COURT: It may.

(Photograph published to the jury.)

MR. PULEO: May I have moment, Judge?

THE COURT: You may.

(Brief pause.)

MR. PULEO: Thank you.

Q Mr. Robinson, you indicated that you believed that the pistol or handgun that you saw Mr. Smith have in his hand just seconds before he shot you was either a .32 or a .38?

A That is correct.

Q And on what did you base that estimate in your – in that part of your testimony?

A How did I come up with that conclusion?

Q Yes, sir.

A Because my father owns several handguns.

Q So you're familiar with handguns, generally?

A I'm very familiar with handguns.

Q Do you know the difference between an automatic handgun and a revolver?

A Yes, sir, I do.

Q And were you able to make observations of this handgun that Melvin Smith shot you with, to see whether it was an automatic or a revolver?

[109] A Yes, sir.

Q And which was it?

A It was a revolver.

Q You indicated earlier that you believed to be in the house at the time of the shooting not only Felicia Brown and Melvin Smith, but also a person that had been introduced to you by Melvin as his brother, James Smith?

A That's correct.

Q Besides what Melvin Smith told you about that person, did you know that person?

A No, sir.



Q Did you know, in fact, whether he was Melvin Smith's brother or not?

A No, sir.

Q Did you see that person in the seconds just before you got shot, when you came down at the bottom of the stairs on the second-floor hallway?

A Yes, sir.

Q And where was that person?

A He was standing to the – he was standing to the right of Felicia.

Q In Felicia's room?

A That's correct.

Q Did Detective Smith ever show you another group of photos

* * *

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 96-11471, 98-11521
96-11797

COMMONWEALTH OF MASSACHUSETTS

v.

MELVIN T. SMITH (SUCR97-11471 and SUCR98-11521)
FELICIA BROWN (SUCR96-11797)

November 5, 1998
Boston, Massachusetts
Before: Donovan, J.
Day 3 – Trial

* * *

[Witness Christopher Robinson]

[55] Q Are you a trained cook?

A A trained crook?

Q A cook. A cook. Have you had training in being a cook?

THE COURT: I think he means a chef.

A Yes.

Q I believe that you testified that the gun that you say was used was a .38 or a .32?

A That would be correct.

Q Okay. Is there a difference between a .38 and a .32?



A Not much.

Q What is the difference?

A The size.

Q Do you remember telling Mr. Anderson that you were sure that it was a .32?

A I remember telling Mr. Anderson that.

Q Do you remember saying that to him at your sworn testimony at the hospital on October 15th of '96?

A That it was not a .22, that it had to be a .32 or a .38.

Q Well, do you remember telling him that you were sure it was a .32?

A I told him it had to be a .32 or a .38.

MR. TOBIN: May I approach, your Honor?

THE COURT: You may.

Q Mr. Robinson, could you please take a look at this Page

* * *

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 96-11471, 98-11521
96-11797

COMMONWEALTH OF MASSACHUSETTS

v.

MELVIN T. SMITH
(SUCR96-11471 AND SUCR98-11521)
FELICIA BROWN (SUCR96-11797)

---

November 12, 1998
Boston, Massachusetts
Before: Donovan, J.
Day 6 – Trial/Charge

* * *

[63] THE COURT: In addition, he's contesting the Yellow Pages as the basis of – I'm going to exclude it.

MR. PULEO: Could I just be heard on it?

THE COURT: The offer of proof is on here.

MR. PULEO: I'm sorry.

THE COURT: The offer of proof is already on here, on the record, and it indicates what you're using as a basis for your offer.

MR. PULEO: But my point about the daylight savings time, I'm not asking the Court to take any judicial notice of –



THE COURT: But that would affect – that could affect her testimony, as to the hour differential. I guess you'll have to stay with what you have.

MR. PULEO: It's a fairer argument, I think, but it has nothing to do whether it's a fact that's appropriate for judicial notice or not.

THE COURT: Well, there are several bases for excluding it. Anything else?

MR. PULEO: No.

THE COURT: Do you rest?

MR. PULEO: Yes.

THE COURT: Gentlemen, Mr. Tobin.

THE CLERK: That photograph, was that decided [64] on?

THE COURT: What about that photograph, the photograph of Mr. Smith?

MR. PULEO: That's already been received as an exhibit, and it's up to the Court to –

THE COURT: So we're just going to substitute the numbers.

MR. PULEO: Right. And earlier in the lobby – since we're on the record now, we can complete the brief discussion we had in the lobby relative to that. What will now be Exhibit –

THE CLERK: – twenty-eight.

MR. PULEO: Twenty-eight. Thank you. We've agreed to – the only disagreement is whether the date of

8/30/96 can be included on the exhibit or not. I'm requesting that it is, because that was information that is not prejudicial and consistent with the testimony –

THE COURT: Well, you could argue that – you can argue that to the jury, that the date was the date that the officer said. I'm going to exclude any date notation on that.

Do you people have, now that Mr. Puleo has finished with all of his evidence and now he's rested, and we'll do it formally in front of the jury, but do you [65] people have anything that –

MR. CARROLL: I do. I'd like to bring it up.

THE COURT: Okay.

MR. TOBIN: I have also.

THE COURT: Mr. Puleo, with respect to Mr. Smith's motion for a required finding of not guilty on the firearm charge, possession of a firearm, do you wish to address that?

MR. PULEO: Yes, briefly, if I may.

THE COURT: Yes. Part one deals with the portion of the statute wherein you have to prove the length of the barrel.

MR. PULEO: I think Mr. Robinson's testimony about the description of the gun was, variously, either a hangun [sic] or a pistol. Mr. Robinson testified that he was familiar with guns because of his father's experience – I don't know if it was in the military, or what it was. And while Mr. Robinson was not asked a direct question about the length of the barrel, I think that those terms as used



by Mr. Robinson, given his level of familiarity, if not quasi-expertise of handgun and pistol, satisfy –

THE COURT: Well, it's the jury that has to make the finding of fact that you've established that, not based upon what Mr. Robinson says is a pistol or a [66] handgun. I mean, the jury has to make a finding.

MR. PULEO: And I think this jury, viewing this evidence in the light most favorable to the Commonwealth, would be warranted in finding that the –

THE COURT: How can they find the length of the barrel?

MR. PULEO: Because there's –

THE COURT: There's not a scintilla of evidence on that.

MR. PULEO: Because Mr. Robinson's testimony that it was a pistol, I think he even said a small pistol, or a handgun, allows for a reasonable inference that the barrel of a pistol or a handgun is not longer than eighteen inches.

THE COURT: Sixteen.

MR. CARROLL: Sixteen.

MR. PULEO: Sixteen inches. I'm sorry.

THE COURT: No, I don't think that there is a basis in which a jury, based upon Mr. Robinson's testimony alone, can conclude that a pistol or a revolver has a barrel length of sixteen inches or less.

MR. PULEO: Well, given that, if that's the Court's interpretation of Mr. Robinson's testimony, then I

will be requesting to reopen and allow Mr. Robinson to [67] testify to that.

THE COURT: Well, this is the time in which they are moving for a required finding of not guilty. I'm going to allow it on the firearm charge.

MR. CARROLL: Your Honor, as to the other two charges, I would argue –

THE COURT: I'm going to deny it with respect to the other two. And I'm going to deny Ms. Brown's, with respect to an accessory.

(End of side-bar conference.)

THE COURT: Mr. Puleo, any further evidence from the Commonwealth?

MR. PULEO: No. At this point, the Commonwealth rests their case.

THE COURT: All right.

MR. PULEO: Thank you.

THE COURT: Mr. Tobin, do you wish to go forward?

MR. TOBIN: Yes, I call Patricia Brown, please.

PATRICIA BROWN, SWORN
[68] DIRECT EXAMINATION

Q (by Mr. Tobin) Good morning. Could you state your name, please, for the Court and the jury?

A Yes. Patricia Brown.



Q And where do you live, Ms. Brown?

A 1019 Beacon Street, Brookline, Mass.

Q Okay. And briefly, what's your education?

A I'm a nurse's aide.

Q Are you employed?

A Yes.

Q And what's your employment?

A I do private-duty nursing.

Q Okay.

THE COURT: I think you'll have to keep your voice a little bit louder so everyone can hear you.

Q Do you know Felicia Brown?

A Yes, I do.

Q All right. And what is your relationship, if any, to Felicia Brown?

A I'm her mother.

Q Do you know Christopher Robinson?

A Yes, I do.

Q What is your relationship, if any, to Christopher Robinson?

[69] A I'm his aunt.

Q Directing your attention to August of 1996, a little over two years ago, where were you living at that time?

A 33 Lawn Street, Roxbury; Boston, Mass.

Q Okay. And where in the house was your bedroom at that time?

A I had a two-floor apartment. I was on the third floor.

Q Okay. Was anybody else on the third floor with you?

A No.

Q Were you married at that time?

A Yes.

Q Okay. Was there a man named Romanis Charles that lived in the house?

A Yes.

Q What room did he stay in in the house?

A My bedroom.

Q Did you stay also in that room?

A Yes.

Q In August '96?

A Yes.

Q Did anybody else stay on the third floor in August of '96?

A No.

Q Were there bedrooms on the second floor?

[70] A Yes, there were.



Q Okay. Whose bedrooms are on the second floor?

A My three children.

Q Okay. And one is Felicia?

A Yes.

Q And how old was Felicia in August of 1996?

A Approximately seventeen.

Q Okay. And her bedroom was on the second floor?

A Yes.

Q All right. Did she share that bedroom with anybody else?

A Yes.

Q Who?

A My daughter Stephanie.

Q Okay. How old was Stephanie in 1996, approximately?

A She was about twelve.

Q Okay. Besides Felicia and Stephanie staying in the one room, did anybody else have a bedroom on the second floor in your house?

A Yes. My son, Tyrone Brown.

Q How old was Tyrone in August of '96?

A He was about thirteen.

Q Directing your attention to August of 1996, did you have occasion to take a trip?

A Yes, I did.

[71] Q All right. Where did you go?

A I went to Alabama.

Q All right. And why did you go to Alabama?

A My nephew wanted me to go with him on a trip, to take his daughter to Disney World.

Q Okay. Did you have family, relatives, down in Alabama?

A Yes, I did.

Q Okay. At some point while you were in Alabama, did you become aware that your nephew Christopher had been shot?

A Yes, I did.

Q How long had you been in Alabama at that time?

A Approximately two days.

Q When had you left Boston?

A That Tuesday before that Friday.

Q Okay. When had you last spent the night at 33 Lawn Street before you heard that news?

A The Monday before that Tuesday.

Q So if Friday was August 16th, you last stayed at 33 Lawn Street on Monday, August 12th?

A Yes.



Q Or thereabouts. Prior to your leaving to go to Alabama, was your nephew Christopher Robinson in Boston, Massachusetts?

A Yes, he were.

[72] Q Okay. Do you know – strike that.

Did you have anybody else living in the house besides the people that you mentioned already?

A Yes, I did.

Q Okay. Who else was living in the house?

A My nephew was there, for a couple of days, maybe.

Q Chris?

A Yes.

Q Okay. What about the first floor?

A Yes, there was other people living there.

Q Were they tenants?

A Yes.

Q Okay. Do you remember their names?

A Yes.

Q Who were they?

A Patrick Verdieu, and Peter.

Q What apartment did they live in?

A The first-floor apartment.

Q Okay. Besides Patrick Verdieu and Peter, was there any other tenants in the house?

A Yes.

Q Who else?

A There was two ladies on the second floor.

Q Okay. Now, directing your attention to approximately two [73] weeks before you left to go to Alabama, did you witness something unusual happen in your house regarding Christopher Robinson and Patrick Verdieu?

A Yes.

Q Okay. When was that in relation to the time that you went down South, approximately?

A About a week, maybe.

Q A week prior?

A Yes.

Q Okay. And where was this?

A It was on the third floor of our apartment, in my living room.

Q Okay. What time of day or night was this?

A It was in the afternoon. Around two or three o'clock, I'd say.

Q Okay. And who else was present, if anyone, besides yourself, Christopher Robinson and Patrick Verdieu?

A Maybe Stephanie was around.



Q And what did you observe at that time?

A A very bad argument went on in the house.

Q Between who?

A Patrick and Christopher Robinson.

Q Okay. And what was the content of the argument?

A Well, Patrick had – I had bought some beer and Patrick [74] took it to his apartment, which I bought it for the two of them. And I assumed that Chris –

MR. PULEO: I object.

THE COURT: Sustained.

Q Only what you saw at that time.

A Well, they wanted to fight over the beer, because –

MR. PULEO: Objection.

THE COURT: Sustained.

MR. TOBIN: May we approach, your Honor?

THE COURT: Yes.

SIDE-BAR CONFERENCE:

MR. TOBIN: I'm just trying to understand the basis of the objection, if it's relevance or if it's the form of the question.

THE COURT: Well, I'm sure there's several bases. But he's objected and I sustained the objection.

MR. TOBIN: Okay. Could I be heard on relevance?

THE COURT: I don't think it's necessary.

(Brief pause.)

MR. TOBIN: The offer of proof I would make would be, if allowed to answer the question, she'd testify about a heated argument between these two people wherein each threatened bodily harm on the other.

[75] THE COURT: Okay.

(End of side-bar conference.)

Q At the time that you're talking about, did you observe the demeanor of Chris Robinson and Patrick Verdieu?

A Yes.

Q What was the demeanor of each?

A Patrick said –

MR. PULEO: Objection.

THE COURT: The objection's overruled. Just their demeanor, their appearance.

A They wanted to fight.

MR. PULEO: Objection. Move to strike.

THE COURT: No. That's already been testified to.

Q Do you recall exactly what Patrick said to Chris and Chris said to Patrick?

A Yes.

Q What did Patrick Verdieu say to Chris?



MR. PULEO: Objection.

THE COURT: The objection's overruled.

A He said that he was going to rip him into pieces if he came back to his apartment to get some beer.

Q And what did Chris say to Patrick?

[76] MR. PULEO: Objection.

THE COURT: The objection's overruled.

A That he was going to come downstairs and hit him with a lock and chain while he's sleeping and burn up his car.

Q Now, at the time you were in Alabama, before you became aware that Chris had been shot, What was your relationship like – strike that.

Do you know Belinda Carter?

A Yes, I do.

Q What is your relationship to Belinda Carter?

A I'm her aunt.

Q I'm sorry?

A I'm her aunt.

Q You're her aunt?

A Yes.

Q Before you got the news that Chris had been shot, could you describe your relationship between yourself and Belinda Carter?

A Well, we were very close.

Q At some point after you got the news that Chris had been shot, did that relationship change at all for a period of time?

A Yes, it did.

Q Okay. Generally, how did it change?

[77] A Well, it was just that they didn't want to have anything to do with my daughter or me.

Q Okay. After you got the word that Chris had been shot, at some point did you come back up to Boston?

A Yes, I did.

Q Okay. Do you remember when that was?

A Two weeks later.

Q Okay. Did you go to 33 Lawn Street?

A Yes, I did.

Q All right. Did you go inside your house?

A Yes, I did.

Q Okay. Did you see anything with regard to the physical condition of 33 Lawn Street that was different from when you had left to go to Alabama?

MR. PULEO: Objection.

THE COURT: The objection's overruled.

A Yes, I did.

Q Okay. What did you see that was different?



A Some items had been broken and the door had been broken.

Q Okay. When you say the door, the door to whose room?

A Tyrone's room.

MR. TOBIN: May I approach, your Honor?

THE COURT: You may.

Q Ms. Brown, with the Court's permission, I'd like to show [78] you a photograph which has been marked as Exhibit 2. I'd ask you to take a look at that and tell us, if you can, what that picture depicts.

A The door was not broken like that when I left.

Q Just tell us, what does the picture depict that you're looking at?

A I see where blood is on the bed.

Q Okay. But what room is it?

A It's in Tyrone's room.

Q Okay. Could you hold it up for the jury, please, and show them?

THE COURT: If you could just step out of the way a little bit so the jurors can see. Thank you.

Q Does that photograph depict the door to Tyrone's bedroom as it was when you came back from Alabama?

A When I came back? It was taken down.

Q It was completely down by that time?

A Yes.

Q Okay. So –

MR. PULEO: Excuse me, Mr. Tobin. I'm going to object and move to strike her previous testimony, then.

THE COURT: You've got to lay a foundation. I'll sustain the objection and strike the testimony with regard to the door.

[79] Q Before, you testified that you left 33 Lawn Street to go to Alabama on the Monday before August 16, correct?

A Yes.

Q Okay. Tell the jury, at the time you left, what was the – did Tyrone's bedroom have a door?

A Yes, it did.

Q Okay. What was the condition of the door at the time?

A The door was perfect.

Q Okay. It was a full door?

A Yes.

Q All right. When did you next see Tyrone Brown's bedroom after you left for Alabama?

A The day before I left.

Q No. After you left.

A When I came back to Boston.



Q When you came back. And at that time, what did you observe as to Tyrone Brown's bedroom with regard to a door or a doorway?

A There was nothing there.

Q There was nothing there. When you came back from Alabama, did you notice if any items that were in the house when you left to go down were now missing or broken?

A Yes.

[80] Q What items?

A A pink vase and a telephone.

Q Okay. With regard to the pink vase, when you left to go down to Alabama, where was the pink vase located?

A Usually I had it sitting right in the hallway.

Q On which floor?

A The second floor.

Q All right. And when you came back from Alabama, did you see the pink vase in the hallway?

A No, I didn't.

Q All right. To this day, have you ever seen the pink vase again?

A No, I haven't.

Q You mentioned a telephone. What room was the telephone in?

A Well, usually we take it from floor to floor.

Q When you left to go to Alabama, what room was the telephone in at that time, if you remember?

A The second floor.

Q Okay. Do you remember which room?

A Felicia's room.

Q Okay. When you came back from Alabama, did you see the telephone?

A Yes, I did.

[81] Q Where was the telephone at the time you first saw it when you came back from Alabama?

A In Tyrone's room.

Q Okay. What was the condition of the telephone at that time?

A It was broken.

Q Broken?

A Yes.

Q While you were in Alabama, before you came back up after getting the word that Chris was shot, did you at anytime have a three-way telephone conversation with your daughter Felicia and your niece Belinda Carter?

A No, I didn't.

Q You did not?

A No.

MR. TOBIN: Your Honor, may we please approach, briefly?



SIDE-BAR CONFERENCE:

MR. TOBIN: Your Honor, I would like to ask Ms. Brown with regard to a conversation that my client had with the district attorney when she was subpoenaed to the Grand Jury, with regard to whether or not she was read any rights. And the reason I do that is, again, on [82] the issue of voluntariness. I understand that the Court has accepted Judge Connolly's judgment that the court rules that the statement is voluntary. But under the humane practice, it's my understanding that the jury makes – has to make that decision, and I do need to put in evidence of involuntariness for them to make that decision.

It would be my position that she's seventeen years old, compelled by subpoena, had two rights that were certainly available to her, namely, the privilege against self-incrimination, not full Mirandas, the privilege against self-incrimination, and the statutory right to counsel. And the fact that given her age and that she had those rights and that she had already told them that she had left the house with Melvin Smith, who had already been identified as the shooter, clearly they knew that she was going [sic] incriminate herself. And they also had knowledge that, according to their view of the case, she was going to perjure herself. And they never told her about any of these rights and I think it's something the jury should hear.

THE COURT: But Judge Connolly already ruled that she wasn't entitled to any rights at the Grand Jury stage, so I'm going to exclude any questions regarding [83] that. I mean, you can ask her questions, obviously, about the age of your client at the time and her awareness of things, and so on and so forth.

MR. TOBIN: Could I just say, Judge Connolly cited the *Guilliard* case to say she wasn't entitled to Mirandas, and I agree that she wasn't entitled to Mirandas, but it is an open question on the issue of whether she's entitled to be told of her limited privilege not to incriminate herself.

THE COURT: Judge Connolly's decision stands.

MR. TOBIN: Okay.

(End of side-bar conference.)

Q Ms. Brown, I have no further questions for you at this time. Other attorneys are going to ask you some questions.

A Thank you.

THE COURT: Mr. Carroll, do you have any questions?

MR. CARROLL: Yes, Judge, I do.

CROSS-EXAMINATION

Q (by Mr. Carroll) Good morning, Ms. Brown. I'm Bruce [84] Carroll.

Ms. Brown, you indicated in response to Mr. Tobin's questions that about a week before you left you observed an argument between Chris Robinson and Patrick Verdieu; is that correct?

A Yes.

Q And in that argument, Patrick Verdieu told Chris Robinson he was going to break Chris into pieces. Is that what you said?



A Yes.

Q Did he say anything else after that?

A Yes, he did.

Q What else did he say?

A Quite a few things. I don't remember.

Q Do you remember what the tone of voice was when he said the other things?

A He was very angry.

Q Was he threatening Chris?

A Yes.

Q And Chris responded to Patrick; is that right?

A Yes, he did.

Q And he said that he was going to come down with his lock and chain. Is that what you said?

A Yes.

[85] Q And what lock and chain is that, Ms. Brown?

A I don't know.

Q Does Chris have a lock and chain?

A I'm not sure.

Q Have you ever seen a lock and chain?

A No.

Q But he said he was going to come down while Patrick was asleep?

A Yes.

Q And get him with his lock and chain?

A Yes.

Q And he said he was going to burn up – Chris said he was going burn up Patrick's car, correct?

A Yes.

Q Did you hear Chris say anything else about what he was going to do to Patrick?

A No.

MR. CARROLL: May I approach the witness, Judge?

THE COURT: You may.

Q Ms. Brown, I'm showing you a couple of photographs that have already been introduced into evidence. They're Exhibit Numbers 2 and 7. Do you see those?

A Yes.

[86] Q And it's fair to say those are pictures of the interior area of 33 Lawn Street on the Second floor?

A Yes.

Q And it's fair to say that Exhibit 2, which Mr. Tobin showed you, is a picture looking from the hallway into Tyrone's room?

A Yes.

Q And the other picture, Number 7, is a picture looking from Tyrone's room outside into the hallway, correct?



A Yes.

Q I want to direct your attention, but I'm going to show it to you and to the members of the jury, to various objects that are on the floor in Exhibit 2. And again, in Picture 7, a different view, with some other objects. Can you see those objects on the floor in those two pictures?

A Yes.

Q Is that the color of the pink vase that had been up in that second-floor hallway?

MR. PULEO: Object to the form of the question.

THE COURT: Sustained.

Q Do you recognize the color of those pieces?

A Yes I do.

Q And what do you recognize the color of that to be?

[87] A The vase.

Q Are those pieces consistent with the pink vase that was in the second-floor hallway?

A Yes.

Q And that's the pink vase you haven't seen since you left for Alabama?

A Right.

Q Did you make any observations of the walls down there on the second floor when you returned from Alabama?

A Yes, I did.

Q And did you notice anything different about the condition of the walls when you returned from Alabama?

A Yes, I did.

Q And what was different?

A There was, like, large holes in the wall.

Q And what did you have to do – where were those holes in the wall?

A In Tyrone's bedroom.

Q I'm sorry?

A In Tyrone's bedroom.

Q And what did you with the holes in the wall?

A I just had them fixed.

Q Thank you, Ms. Brown.

THE COURT: Cross-examination, Mr. Puelo [sic]?

[88] MR. PULEO: Thank you.

CROSS-EXAMINATION

Q (by Mr. Puleo) Good morning, Ms. Brown.

A Good morning.

Q You were down in Alabama and you learned that your nephew Chris Robinson was shot in your home at 33 Lawn Street, correct?

A Would you repeat that?



Q You were down in Alabama, to take a family – go on some family trip to Disney World –

A Yes.

Q – when you learned that your nephew Christopher Robinson had been shot in your home in Boston at 33 Lawn Street, correct?

A Yes.

Q After you learned that that happened, how long was it before you returned to Massachusetts?

A About two weeks.

Q Did you still go to Disney World, ma'am?

A I didn't go. I was in Alabama.

Q Was there something special about this pink vase?

A No, there wasn't.

[89] Q Did it have any sentimental value to you, ma'am?

A No, it didn't.

Q And when you returned home two weeks after learning that someone was shot in your home, you noticed that a pink vase was missing?

A I knew it before I returned home.

Q You knew about it before you returned home?

A Yes, I did.

Q That it would be missing?

A It didn't really matter.

Q The pink vase didn't really matter, did it?

A No, it did not.

Q You said that in August of 1996 your daughter Felicia Brown was how old?

A Approximately seventeen.

Q And when was she going to turn eighteen?

A When was she going to turn eighteen?

Q Yes, ma'am.

A September 29th.

Q The next month. She was a month short of eighteen, right.

A Yes.

Q Do you recall when it was when you first talked to Tony Smith, the detective on this case?

[90] A Yes, I do.

Q When was that?

A The very same day Chris Robinson got shot.

Q And you were in Alabama?

A Yes, I were [sic].

Q So I take it this was a telephone conversation?

A Yes, it were [sic].



Q All right. And did you tell Detective Smith about this argument that you had witnessed a couple of weeks before with Mr. Robinson and Mr. Verdieu?

A Yes, I did.

Q You did. When you returned to 33 Lawn Street, was Mr. Verdieu still a tenant in your home?

A Yes he were [sic].

Q How long after August 16th of '96 did Mr. Verdieu continue to rent at the first-floor apartment of 33 Lawn Street?

A About a year and a half, maybe.

Q And this argument between Mr. Robinson and Mr. Verdieu, I think your testimony was, was a couple of weeks before the 16th.

A Maybe about a week before the 16th.

Q All right. And you had made arrangements with Chris to stay at your home while you were in Alabama, correct?

[91] A No, I didn't.

Q Were you aware that Chris was making arrangements with anyone to stay at your home?

A No, I didn't.

Q Did you have any reason to believe Chris was going to be staying at your home?

A No, I didn't.

Q Did you ever tell your daughter Felicia that you had made arrangements for Chris to come and watch the house while you were in Alabama?

A I could have told her that he was going to be coming by to check the house every once in a while.

Q Well, why would you tell your daughter Felicia Brown that your nephew Chris would be coming by if, in fact, you didn't expect him to be coming by, because you had not made any arrangements for him to come by?

A I told her over the phone.

Q But your testimony is that you made no arrangements for Chris to come by to check on the house, correct?

MR. CARROLL: Objection, your Honor.

THE COURT: The objection's overruled.

A Not to check the house, no.

Q So then why did you tell your daughter Felicia, "Chris will be coming by to check the house while I'm gone"?

[92] A I don't know if I told her that. It's been two years now. Maybe I did or maybe I didn't.

Q Is there any – can you fathom a reason in the universe, ma'am, why you would tell her that if it's not something that was in your head?

MR. CARROLL: Objection.

THE COURT: Sustained.

A Well, my husband was there –



THE COURT: I sustained the objection. He'll put another question to you.

Q Did you ever tell your husband, Romanis Charles, that Chris would be staying at the house, helping out with chores, while you were in Alabama?

A No, I didn't.

Q After this argument between Mr. Verdieu and Mr. Robinson approximately a week – was it a week before Chris was shot or the week before you left for Alabama?

MR. CARROLL: Objection, your Honor.

A About a week.

THE COURT: The objection's overruled.

Q I'm sorry?

A About a week before I left.

Q Before you left. And you left maybe that Tuesday of that week?

[93] A Right.

Q And after the argument, but before you left, did you ever see Chris at 33 Lawn Street again?

A Yes, I did.

Q And after the argument, but before you left, did you ever see Chris at 33 Lawn Street again?

A Yes, I did.

Q And was Patrick Verdieu ever there during that week that you saw Chris there?

A Patrick was working. I didn't see him that much.

Q How often did you see Mr. Robinson for that week after the argument with Mr. Verdieu but before you left for Alabama?

A Maybe two or three times.

Q Did you make any attempt to prevent Mr. Robinson from coming by 33 Lawn Street during that week?

MR. CARROLL: Objection.

THE COURT: The objection's overruled.

A Did I prevent him from coming by?

Q Did you make any attempt to prevent him from coming by your house?

A No, I didn't.

Q You didn't think that Chris was going to set Mr. Verdieu's car on fire, did you?

MR. CARROLL: Objection.

THE COURT: Sustained.

Q Do you remember meeting Detective Smith once you did [94] return to Boston approximately two weeks after the shooting?

A Yes.

Q Incidentally, if you didn't go to Disney World, what did you do down in Alabama for two weeks before you returned here?

MR. CARROLL: Objection.



THE COURT: The objection's overruled.

A What did I do?

Q Yes, ma'am.

A Mostly waited around to see if he was going to be all right.

MR. CARROLL: Objection, your Honor.

THE COURT: The objection's overruled.

MR. CARROLL: May we approach?

(Brief pause.)

MR. PULEO: Mr. Carroll –

THE COURT: Oh, I'm sorry.

MR. PULEO: – requested to approach side-bar, Judge.

MR. CARROLL: May we approach?

SIDE-BAR CONFERENCE:

THE COURT: I overruled your objection. What [95] was the basis of it? What did you want to see me at side-bar for?

MR. CARROLL: Well, what I'm expecting the answer may well be, Judge, is that she waited around to see if Chris was going to die. And I don't that that's probative, and certainly it's much more prejudicial –

THE COURT: No, no.

MR. TOBIN: She expected that he was going to die and that the body was going to go back down there for burial and that's why she waited.

THE COURT: All right. Go on to something else, then.

MR. PULEO: Sure.

(End of side-bar conference.)

Q Ms. Brown, you said you came back to Massachusetts approximately two weeks after you learned that Chris had been shot?

A That's right.

Q And did there come a time, after your return to this state, that you and Detective Tony Smith and your daughter Felicia Brown had a conversation?

A Yes.

Q Do you recall where that conversation took place?

[96] A Yes.

Q Where was that?

A At my home, 33 Lawn Street.

Q And do you recall Felicia Brown telling Detective Smith at that time that she didn't know where the shots were coming from?

A Yes, I remember.

Q Okay. And do you recall telling Felicia, "Felicia, you should know what floor the shots were coming from"?

MR. CARROLL: Objection.



MR. TOBIN: Objection.

THE COURT: Sustained.

Q Do you recall what you said, if anything, to Felicia while Detective Smith was interviewing her?

MR. TOBIN: Objection.

THE COURT: I'll see counsel at side-bar.

SIDE-BAR CONFERENCE:

THE COURT: On what basis would her statement to her daughter be admissible?

MR. PULEO: Just, if, in fact, she made the statement during that interview.

THE COURT: Well, you have to have some basis for offering an out-of-court statement. She says to her [97] daughter, you know, I think one of the things was, "Tell the truth," or whatever. You know, you have to have some basis for offering that statement.

MR. PULEO: I'm not offering – I would submit that it's not hearsay, because I'm not offering it to prove the truth of anything asserted –

THE COURT: Well, what are you offering it for?

MR. PULEO: As a matter of fact, I don't even think it's assertion.

THE COURT: What are you offering for?

MR. PULEO: Just to show that the witness is –

THE COURT: That she made the statements?

MR. PULEO: Yes.

THE COURT: No. You still have to have a basis for introducing the statement.

MR. PULEO: Well, her impressions of her daughter's statement, I think, are relevant to her credibility as a witness.

THE COURT: I'll exclude it.

MR. PULEO: Thank you.

(End of side-bar conference.)

Q Ms. Brown, do you remember where in Tyrone's room the holes in the wall were that were not there when you left [98] for Alabama but were there upon your return?

A From the window of his bedroom, on the right side.

Q On the wall where the windows were?

A Yes. And on the left side.

Q On the right side of the windows?

A No. The side of the bed.

Q Okay, the side of the bed. Is there a window on that side of the bed?

A The side of the bed there's a window.

Q And was the damage somewhere near the window that was on that wall?

A Yes.

Q Do you recall where?

A Up in the center.



Q In the center of what, please?

A The wall from the – from the window to the closet. And there was another hole in the wall from the – near the dresser.

Q And there was another hole in the wall near the dresser?

A Yes.

Q Are there windows on that wall?

A No, it isn't.

Q Is that the dresser that your son Tyrone had some stereo/electronic equipment?

[99] A Yes.

MR. PULEO: May I approach the witness, Judge?

THE COURT: You may.

Q Ma'am, let me hand you Exhibit Number 3, please. And can you identify what's shown in that photograph?

A Yes.

Q Is that a picture of Tyrone's room?

A Yes, it is.

Q Can you see the window that's on the wall, on the side of the bed?

A Yes.

Q Can you hold up that photograph so the jury can see it, please, and point to the hole that you've testified about in that photograph.

A The hole is somewhere near – further up, near the window. This is the window, this is the wall here. And the room is kind of long, so it's somewhere between the bed and the closet.

Q So it's not shown in that photograph, is it?

A No, it isn't.

Q How about Exhibit Number 5, ma'am, can you tell us what that's a picture of?

A Yes.

Q Is that the wall on the side of the bed, going to the [100] closet, that you just told us about?

A Yes, it is.

Q Can you hold that picture up and can you – is there anywhere on that photograph that shows the hole that you're talking about, ma'am?

A No, it isn't.

Q That photo doesn't show any damage, either, to the wall, does it?

(No verbal response.)

THE COURT: Do we have an answer to that? The question was, that doesn't show any –

THE WITNESS: No, it doesn't.

THE COURT: All right.



Q And Exhibit Number 4, ma'am, is that a photograph of the dresser that had Tyrone's stereo equipment on it?

A Yes, it is.

Q Is the hole that was on the wall behind the dresser shown in that photograph?

A No, it isn't.

Q How about Exhibit Number 16, is that a photograph of the rest of that wall with the dresser with the stereo it had been against?

A Yes.

Q And does that photograph show damage in the wall that [101] you've testified to?

A No, it does not.

Q And where is the damage on the wall that the dresser and stereo were against?

A I'm not sure if the hole was fixed before these pictures was taken.

Q Maybe the hole was fixed by the time these pictures were taken?

A Maybe.

MR. PULEO: I don't have any other questions of this witness.

THE COURT: Any redirect, Mr. Tobin?

MR. TOBIN: Yes, your Honor.

REDIRECT EXAMINATION

Q (by Mr. Tobin) Ma'am, in August of 1996, was your nephew Chris welcome in your house?

A Yes, he were.

Q Was he welcome in your house any time?

A Yes.

Q To stay over if he wanted?

A Yes.

MR. TOBIN: Thank you. That's all I have.

[102] THE COURT: Mr. Carroll.

RECROSS EXAMINATION

Q (by Mr. Carroll) Ms. Brown, Exhibit Number 16 is a photograph of Tyrone's room. Can you show the jury and the Court roughly the area where the damage was done? If the damage is even in the area depicted in that photograph. Was there damage done in the area depicted in that photograph, that you remember?

A I believe it was somewhere –

Q I'm sorry?

A I think it was somewhere in this area.

Q And you're pointing to the photograph and sort of showing the area between – to the right of the TV; is that right?

A Yes.



Q And it's a very narrow space in there?

A Yes, it is.

Q I'm going to show you two other pictures that Mr. Puleo showed you, Exhibits 3 and 5. They show that other wall, correct? Or at least parts of that other wall where the damage was done, correct?

A Yes.

[103] Q Do either one of those pictures depict the area where the damage was done?

A No.

Q And that's a fairly big wall, right?

A Yes.

MR. PULEO: Objection.

THE COURT: Sustained.

Q What's the size of that wall?

A It's –

Q Well, can you describe it as big, or small, or medium, or anything of that nature?

MR. PULEO: I object.

THE COURT: Maybe the length of it.

Q Can you give us the length of that wall?

A That wall is about – maybe 36.

Q I'm sorry?

A It may be about 36.

Q Thirty-six what?

A From the bed to the closet.

Q Thirty-six . . . ?

A Long.

Q And how about the height?

A Maybe about 82.

Q Are you talking inches, or feet, or what?

[104] A Inches.

Q And in those two pictures, Exhibits 3 and 5, how much of that wall is actually seen in those two pictures? What portions of wall, do you know?

A Very little.

MR. CARROLL: Thank you. That's all I have.

THE COURT: Anything further, Mr. Puleo?

MR. PULEO: No.

THE COURT: Thank you. You may step down.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Mr. Tobin?

MR. TOBIN: The defendant Felicia Brown rests, your Honor, at this time.

THE COURT: Mr. Carroll?



MR. CARROLL: May I have a minute, please, Judge?

THE COURT: You may.

(Brief pause.)

MR. CARROLL: Defendant Melvin Smith rests, your Honor.

THE COURT: All right. Members of the jury, all of the evidence has been concluded. What we're going to do is take our morning recess, and then we'll resume and [105] have final arguments and I'll instruct you on the law and we'll send you out to deliberate the case.

In the meantime, remember my instruction that you're not to discuss the case among yourselves.

COURT OFFICER: All rise. Jurors, please step this way.

(Jurors exit at 11:31 a.m.)

THE COURT: Counsel, with respect to the general charge, I understand, Mr. Tobin, you're asking for a charge on humane practice as to the statement that your client made to Detective Smith and also to the grand jury; is that correct?

MR. TOBIN: Yes, your Honor.

THE COURT: All right. I'll give that instruction.

MR. TOBIN: Could I also just file a motion, Judge, for a required finding after the close of all of the evidence?

THE COURT: Certainly.

MR. CARROLL: I'd like to renew my motion as well, your Honor.

THE COURT: Okay. Both motions are denied.

Now, with respect to your client not testifying, do you wish an instruction?

[106] MR. TOBIN: Yes, Judge.

THE COURT: All right. Let me turn to Mr. Carroll. Do you wish an instruction?

MR. CARROLL: I request the same instruction, your Honor.

THE COURT: Okay. I'll also give an instruction with respect to the photographs which have been referred to at various times during the testimony of witnesses. And I will tell the jury, as I told them before, that there are many reasons why the police would have photographs and they're not even to – not to draw any adverse inference or even discuss it.

I will charge them on prior convictions. We have prior convictions as to Mr. Robinson and they can use that on the issue of his credibility.

And I will give the instruction on identification, based upon *Cuffie* and modified by *Santoli*. And I also will add to it the fact that sometimes people can make a good-faith mistake in an identification.

MR. CARROLL: Can the Court add some maybe – I don't know if this should be part of the identification instruction, but perhaps a credibility instruction, the ingestion of controlled substances and alcohol as it –



[107] THE COURT: I'll leave that up to you people to argue that to the jury.

MR. CARROLL: But I'd like to request such an instruction.

THE COURT: I'm going to leave that up to argument. There'll be no second instruction on that.

All right. Anything that any counsel wish to add with respect to the general instructions?

MR. PULEO: Just that it's the Commonwealth's position that the *Cuffie* instruction supplemented with *Santoli* is appropriate and the Court ought not to go any further than that about a good-faith mistake.

THE COURT: All right.

MR. CARROLL: Judge, I haven't prepared these, and I think the Court has them probably, but if the Court could remind the jury again about what the function of counsel is.

THE COURT: Oh, I do. That's part of my general instructions.

MR. CARROLL: That's my memory. I just want to make sure that it's on the record. And also remind the jury about motions to strike, the effect of striking the evidence. I'd also request an instruction on prior inconsistent statements.

[108] THE COURT: I give that, too.

MR. CARROLL: I anticipated that, Judge, but I just wanted to make sure we're covering our bases here.

THE COURT: All right. And also bias and all of those other issues. Reasonable doubt is included in the package.

Now, the next will be the substantive law. We have two indictments with respect to Mr. Smith; armed assault with intent to murder. And I will tell the jury that there are three elements the Commonwealth must prove. First, that Mr. Smith assaulted Mr. Robinson; second, that he had the specific intent to cause the death of Mr. Robinson; and third, that the assault was committed with a dangerous weapon.

We have discussed in chambers earlier this morning the lesser-included offense of assault with intent to kill, being that the Commonwealth must prove that there were no mitigating circumstances, and so I will instruct them on the lesser-included of assault with intent to kill.

MR. PULEO: While being armed. I'm sorry –

THE COURT: Oh, yes, while being armed, definitely.

MR. PULEO: Thank you.

[109] THE COURT: Yes. Anything, Mr. Puleo, you wish to add to that?

MR. PULEO: No.

THE COURT: Mr. Carroll?

MR. CARROLL: No, your Honor.

THE COURT: Okay. Then we have the next indictment of assault and battery by means of a dangerous weapon. I'm going to, in the initial armed assault with



intent to murder, define for them what is an assault, and I'll further that by saying we'll take those two definitions – there are two ways of committing an assault, and to constitute an assault and battery, that means that there is an unpermitted touching in addition to the assault, and furthermore, it was done by means of a dangerous weapon, to wit: a gun.

Anything either counsel wish to add to that?

MR. PULEO: I don't think so, assuming that the Court's standard instruction relative to an unlawful touching includes putting in force the motion that causes the touching, such as a bullet from a gun, et cetera. Nothing else, then. Thank you.

MR. CARROLL: That's fine, Judge.

THE COURT: All right. Then the next one we go to is the charge against Ms. Brown, accessory after the [110] fact. There are four elements that the Commonwealth must prove. First, that a felony has occurred. And I'm going to define what a felony is, that either the armed assault with intent to murder or its lesser-included offense of armed assault with intent to kill or the assault and battery by means of a dangerous weapon under the law constitutes a felony, that the Commonwealth must prove that one of those felonies occurred. They must prove that the defendant Ms. Brown knew that Mr. Smith had committed the felony. And the third element that the Commonwealth must prove is that after the felony was committed, Ms. Brown harbored, concealed or assisted Mr. Smith. And fourth, that she acted with the intent that Mr. Smith should avoid arrest, trial, or punishment.

Mr. Puleo?

MR. TOBIN: May I be heard, your Honor?

THE COURT: Well, let me go to Mr. Puleo first.

MR. PULEO: I have no comment or objection to those instructions.

THE COURT: Okay.

MR. TOBIN: Judge, as far as instructing them that the felony would be established by the commission of assault and battery by means of a dangerous weapon on the part of Mr. Smith, she was not charged with that in the [111] indictment. She was specifically charged with assault – the felony being assault with intent to murder. And I can understand that the lesser-included could come into play, but I would object to an instruction that if Mr. Smith is fond to have committed assault and battery by means of a dangerous weapon that Ms. Brown could be found guilty.

THE COURT: Mr. Puleo?

MR. PULEO: Could I have just a moment, your Honor? I know that Mr. Anderson did file a Bill of Particulars in the case.

(Brief pause.)

MR. TOBIN: I could help Mr. Puleo with that.

(Brief pause.)

MR. PULEO: I appears that both the indictment and the Bill of Particulars limit the accessory to assault with intent to murder.

THE COURT: Correct.



Mr. PULEO: As well as its lesser-included offense.

THE COURT: All right. So, with that modification. Anything else? Mr. Tobin?

MR. TOBIN: Yes, your Honor, please.

THE COURT: Yes.

[112] MR. TOBIN: I am requesting that the Court instruct the jury that the only actions on Ms. Brown's part that could constitute harboring, concealing, or assisting are the acts alleged in the indictment and the Bill of Particulars; specifically, driving away from the scene with Melvin Smith, number one –

THE COURT: I'll tell you what I said. That she drove away from the scene with Mr. Smith, knowing he shot Christopher Robinson with a firearm with the intent to murder him. It's also alleged that she gave a false statement when she told the police she was not present when Christopher Robinson was shot. Furthermore, the Commonwealth alleges that she gave a false statement about who was present at the shooting, and she gave a false statement about where and when she and Melvin Smith made a phone call from after the shooting – the place where they made the phone call from after the shooting, all of these with the intent to harbor, conceal, maintain, assist, or aid. Those are the ones that are set forth in the Bill of Particulars.

MR. TOBIN: Yes. I would add that in my – I understand the Court denied my motion for a required finding, but I did specifically point out that it's my recollection of the evidence that there is no evidence of [113] her stating a particular time to the police or to the grand

jury that she made a telephone call. So I would ask the Court to consider striking that portion of the Bill of Particulars, number one.

And number two, I'm concerned about – it's my position that anything she said to the grand jury should not be the basis for the substantive offense, because the Bill of Particulars, in my view, indicates [sic] lied to the police. And if they're going to use that as a subsequent or prior inconsistent statement, that's one thing, with regard to any inconsistences [sic] that might be in there. And I think there might be one, that I can think of.

But my request is that the Court instruct the jury that only the statements made to the police, certainly not to Belinda Carter and not to the grand jury, can form a basis for the substantive offense.

THE COURT: Okay. Mr. Puleo?

MR. PULEO: I think that the wording of the Bill of Particulars, I think we ought – well, I think that ought to control, in terms of –

THE COURT: It does.

MR. PULEO: – as the Court instructs the jury. And the way I read the Bill of Particulars, and appreciating that the Court, I think, was reading from [114] the Bill of Particulars when you stated, Judge, what you propose to instruct the jury, I don't think that you stated "lied to the police" or "made a false statement to the police" about who shot Christopher Robinson. That is specifically listed, so I would ask you to include that. If you said it, I just didn't hear it, Judge.



Appreciating that the only thing that's not going to the Bill of Particulars was pursuant to Mr. Tobin's earlier motion about his client not going to the police, and I'm not quibbling about that. I think the wording of the Bill of Particulars is clear that the – to the police – what Mr. Tobin submits as limiting language to the police is only about who shot Christopher Robinson and all the other allegations are simply that she lied, appreciating the Court's going to use the phraseology, "made a false statement regarding." And so it's not limited to the police, and so I think it does include the grand jury and all other –

THE COURT: I'm going to state that it's the statements to the grand jury that are included also.

MR. TOBIN: But not Belinda Carter, your Honor?

THE COURT: No. Any statement that she made.

MR. TOBIN: Even to a civilian?

THE COURT: Yes.

[115] MR. TOBIN: Could my objection be noted as –

THE COURT: Well, not to a civilian, because that's not –

MR. TOBIN: Well, that's Belinda Carter.

THE COURT: Yes.

MR. TOBIN: Well, it would specifically say that –

THE COURT: No. It would be the statements that she made to the police officer, the statements that she made to the grand jury, period.

MR. TOBIN: Could my objection be noted as to the grand jury statements?

THE COURT: Certainly.

MR. TOBIN: And the only other thing, Judge, is –

MR. PULEO: I'm sorry, Mr. Tobin. Before we leave that subject matter, could I note my objection, too, to –

THE COURT: Certainly.

MR. PULEO: – not include any statements to any witnesses –

THE COURT: You may note – it's noted.

MR. PULEO: Thank you.

THE COURT: All rights.

[116] MR. TOBIN: And the only other thing, your Honor, that I'd like to address would be with regard to the language in the Kelly case, which I think is significant, given the facts of this case. I have requested some specific language, on page 5, with regard to the intent to – the intent that Melvin Smith avoid arrest, trial, or punishment, with regard to if – obviously, if there's other motivations, then there's a – there would be a reasonable doubt and she'd have to be found not guilty if they find that she's motivated.

*Kelly* is the case that specifically said that the defendant did what he did; namely, kept custody of a gun used in someone else's robbery and told somebody that he was



going to get rid of the gun. And the SJC flipped the conviction, saying that it's just too speculative as to whether – was the so-called accessory doing these things with the gun and going to get rid of it so that the robber, the principal felon, could avoid arrest, trial, or punishment, or was he doing it for his own self-interests, so that he didn't get prosecuted.

And it's my position in this case that given the state of the evidence – I'm not trying to argue my required finding motion again with you, but I'm certainly interested in an instruction, as I've asked for, that [117] certainly if you have a reasonable doubt that she committed the acts in question with the specific intent to obstruct justice as opposed to committing the acts out of fear, out of a desire to protect herself from prosecution, or out of a desire to avoid incurring the contempt, or whatever word is appropriate, of family members, which in my view tracks *Kelly*, the rule in *Kelly*.

THE COURT: I'm not going to give it that way.

MR. TOBIN: I will be able to argue that?

THE COURT: No. That deals with a family member. This case doesn't.

MR. TOBIN: It's my intention to argue that there's reasonable doubt that she had the intent –

THE COURT: Oh, you can argue it, yes.

MR. TOBIN: – based that – that even if she did these things and he did things, she was motivated by her own selfish interests.

THE COURT: There has to be some evidence on that.

MR. TOBIN: Well, if –

THE COURT: If you –

MR. TOBIN: There was evidence, according to Christopher Robinson, that Melvin Smith, after doing the [118] shooting, with the gun in his hand, said "Let's go" and she went with him. Certainly, that is –

THE COURT: But you remember, you can't – I'm going to tell the jury you cannot speculate. You know, any inferences they draw must be reasonable and natural, based upon the evidence.

MR. TOBIN: Well, should I not be able to argue this reasonable inference that she went out of fear?

THE COURT: Well, you can argue whatever inferences you think are reasonable.

MR. TOBIN: Okay. I will be arguing those inferences.

THE COURT: Okay.

MR. TOBIN: And could I note my objection to the denial of my Request Number 4 in its language?

THE COURT: Yes.

MR. TOBIN: Thank you.

THE COURT: Let met ask, approximately how long do you think your final arguments will be? Because I have to gauge lunch for the jurors, too.



MR. TOBIN: I would say twenty minutes for myself.

MR. CARROLL: Twenty minutes, half an hour, maybe, Judge.

[119] MR. PULEO: I think I'm anticipating in that same ball park.

THE COURT: A half hour or so?

MR. PULEO: Yes.

THE COURT: All right. Let's take a 15-minute recess now and then we'll have final arguments. I think maybe what we may end up doing is having the final arguments, lunch, and then instructions.

COURT OFFICER: All rise, please.

(Recess)

COURT OFFICER: All rise.

(Jurors enter at 12:10 p.m.)

COURT OFFICER: Court is open. Please be seated.

THE COURT: May I see counsel at side-bar, please?

SIDE-BAR CONFERENCE:

THE COURT: Mr. Puleo gave me a case, *Commonwealth* v. *Sperrazza*, 372 Mass. 667, at 1977 case. And I don't know if you've had an opportunity to read it, Mr. Carroll, but the –

[120] MR. CARROLL: I'm familiar with what it says, in general, Judge.

THE COURT: The long and the short of it is – and I've checked it against other materials – and the long and the short of it is that the jury – the Commonwealth doesn't have to put in any evidence. The jury can infer the length of it based upon the type of instrument.

MR. CARROLL: *Sperrazza* is a 1977 case, Judge. The two cases that I cite in my brief memo regarding the required finding were 1997 and 1998 cases, *Hamilton* and *DeJesus* –

THE COURT: Do you have copies of them?

MR. CARROLL: Yes, Judge.

(Brief pause.)

MR. CARROLL: And I've also pointed out to the Court, without having looked at *Sperrazza* recently –

THE COURT: Let me ask you this. Do they cite *Sperrazza* in either one of these?

MR. CARROLL: I don't remember if they cite *Sperrazza* in either one of these, Judge. I don't remember off the top of my head. But in *Sperrazza*; there's testimony regarding the –

THE COURT: The bullet.

[121] MR. CARROLL: Well, there's also testimony about the defendant pulling a gun out of his waistband, or something like that, that would go to whether or not something over sixteen or eighteen inches would even be able to – capable of doing it.



THE COURT: No. I –

MR. CARROLL: There's something to be – there's some basis on which an inference can be drawn. And this –

THE COURT: Okay. Let me ask you this. Let me ask you this. In *DeJesus*, they're talking about a shotgun.

MR. CARROLL: That's right. But they're still referring to the same statute.

THE COURT: But it's a shotgun.

MR. CARROLL: That's right. But they're still saying you have to show – there has to be some evidence of the barrel length in order for it to qualify.

THE COURT: I think that can be distinguished. Let me ask you about *Hamilton*.

MR. CARROLL: It's a shotgun also, your Honor.

THE COURT: Okay.

MR. CARROLL: And in *Commonwealth* v. *Muse*, which I cite as a – as a court case in my memo, it's a [122] handgun. In *Commonwealth* v. *Muse*, the Commonwealth conceded there was no evidence as to barrel length. So all the appellate courts did in that situation was, since the Commonwealth conceded there was no evidence as to barrel length, they entered a finding as not guilty.

THE COURT: Yes, but that hasn't happened here.

MR. CARROLL: Right. I understand that. But what I'm suggesting is, the facts in *Muse* are a little different

than the facts in this case regarding whether or not there's any evidence of the barrel length. In *Hamilton*, there's a – if I may, Judge –

MR. PULEO: I don't want to interrupt anybody's thought train, but I do have a suggestion.

THE COURT: Okay.

MR. PULEO: I have another cite that I just learned about at the break. It's a '93 court of appeals case. What I would request, though, rather than research on what I think is a legitimate question, at least to these three, though they have differing ideas of what the controlling law was, if the Court allows me to take the count to the jury and then certainly if the jury comes back not guilty, it's moot. But if they come back guilty and the Court is of the mind that that charge should not have gone to the jury, under Rule 25, of [123] course, the Court still –

THE COURT: Uh-huh. I can always set it aside.

MR. TOBIN: – has the option to allow the motion at that point and then we don't have to –

THE COURT: I think that's the way we'll do it. So we'll let it go to the jury.

MR. PULEO: Thank you. There's two other points.

THE COURT: Yes.

MR. PULEO: One is, I'm requesting to call Detective Smith for a rebuttal, and the offer of proof is just that while he talked to Patricia Brown several times about the case, she never mentioned to him any dispute or



argument that she had witnessed between Mr. Verdieu and Mr. Robinson.

And then the third thing is relative to sanitizing the photo array exhibits. We all collectively recall that all the numbers on the bottom came off.

THE COURT: Right.

MR. PULEO: But we didn't have any consensus in terms of recollection as to the numbers in the top right corner. I think initially something came off and then we said – and then I thought the Court maybe changed her mind.

[124] THE COURT: What we did was, we left the date on there and the time.

MR. PULEO: Okay.

THE COURT: In the upper right-hand corner.

MR. PULEO: Okay. But the next two lines come off?

THE COURT: They come off.

MR. PULEO: Okay.

THE COURT: All right. With respect to recalling the detective, I'm going to deny that. You made your offer of proof.

MR. CARROLL: On my motion for a required finding on the handgun, in addition to the barrel length –

THE COURT: Yes, I'm reversing that.

MR. CARROLL: In addition to arguing the barrel length, there were other grounds within the motion

for asking the Court to direct that particular finding to be not guilty. I would like to argue those issues and –

THE COURT: No. I'm going to deny it at this point, your motion for a required finding of not guilty on the gun charge.

MR. CARROLL: Well, I just want to make sure the Court, and that it's on the record, that part of the [125] motion is that –

THE COURT: The motion has already been ruled on in this case.

MR. CARROLL: – the only evidence as to where Mr. Smith was staying at the time of the shooting is the statement of Christopher Robinson that Mr. Smith was, in fact, staying at – had been staying at their – at 33 Lawn Street for the same amount [sic] time that Mr. Robinson had, for a week preceding the shooting.

THE COURT: I understand.

MR. CARROLL: That's the residence –

THE COURT: I understand, and I'm denying it.

MR. CARROLL: And also, I've also argued by analogy the *Castle* statute, that he's there as a legitimate guest, at worst.

THE COURT: Yes. Thank you.

(End of side-bar conference.)

THE COURT: Mr. Tobin?

MR. TOBIN: With the Court's permission, yes, Your Honor.



THE COURT: Certainly.

MR. TOBIN: May I proceed?

THE COURT: Certainly.

* * *

[204] alleges that the defendant committed an assault and battery by means of a dangerous weapon, to wit: a gun, on Mr. Robinson. And the essence of the Commonwealth's battery, the second element, being that the bullet discharged from the gun hit Mr. Robinson, constituting an unprivilegd [sic] touching.

So if you find that the Commonwealth has proven beyond a reasonable doubt that the defendant assaulted Mr. Robinson, that he committed the battery, that is, discharged a bullet from the gun, and the bullet hitting Mr. Robinson being a touching without right or excuse for doing so, and that it was done with a dangerous weapon, to wit: a gun, you shall find the defendant guilty of assault and battery by means of a dangerous weapon.

If the Commonwealth has failed to prove beyond a reasonable doubt any one of those elements, you shall find the defendant not guilty.

The next indictment, the third indictment against Mr. Smith, is for possession of a firearm, not being at home or work. In order to prove the defendant guilty of this particular indictment, there are four elements the Commonwealth must prove and they must prove each one beyond a reasonable doubt.

The first element the Commonwealth must prove [205] beyond a reasonable doubt is that the defendant possessed a firearm; second, that the item that the defendant

possessed met the legal definition of a firearm; third, that the defendant knew he possessed the firearm; and fourth, that the defendant possessed a firearm outside his residence or place of business. Let me go over those four elements again.

One, that the defendant possessed a firearm; two, that the item that the defendant possessed met the legal definition of a firearm; three, that the defendant knew he possessed a firearm; and four, that he possessed a firearm outside of his residence or place of business.

A firearm is defined in our law as a pistol, revolver, or other weapon, loaded or unloaded, from which a shot or bullet can be discharged, and the length of whose barrel is less than sixteen inches. So that's the definition of a firearm: a pistol, revolver, or other weapon, loaded or unloaded, from which a shot or bullet can be discharged, and the length of whose barrel is less than sixteen inches.

The definition can be broken into three elements itself. First, it must be a weapon; second, it must be capable of discharging a shot or a bullet; and third, it must have a barrel length of less than sixteen [206] inches. The term barrel length refers to that portion of a firearm from which a shot or a bullet is driven, guided, or stabilized, and it includes the chamber.

As I mentioned before, the Commonwealth must prove beyond a reasonable doubt that the defendant knew he possessed this item and also knew that it was a firearm within the common meaning of the term.

The fourth element the Commonwealth must prove beyond a reasonable doubt is that the defendant possessed the firearm outside of his residence or place of business.



The person's residence or place of business does not include common areas of an apartment or office building, but only areas that are under that person's exclusive control.

If the Commonwealth proves beyond a reasonable doubt each one of the four elements that I have just defined for you, that is, the defendant possessed a firearm, that the item that he possessed met that legal definition of a firearm, that he knew he possessed the firearm, and that he possessed a firearm outside of his residence or place of business, you shall [sic] the defendant guilty as charged. If the Commonwealth fails to prove beyond a reasonable doubt any one of those four elements, you shall find the defendant not guilty.

* * *

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 96-11471, 98-11521
96-11797

COMMONWEALTH OF MASSACHUSETTS

v.

MELVIN T. SMITH (SUCR96-11471 and
SUCR98-11521)
FELICIA BROWN (SUCR96-11797)

November 13, 1998
Boston, Massachusetts
Before: Donovan, J.
Day 7 – Deliberations

* * *

[7] Wayne Clark." I have spoken with counsel and counsel have all agreed that I indicate on here, "No. It is not an exhibit." I have done that and signed my name, Judge Donovan. We'll mark this for identification, D for Identification. I'll put it back in the envelope and the court officer can return it and tell them to, after they read it, to give it back and return it to the courtroom.

All agreed, counsel?

MR. PULEO: Yes.

MR. CARROLL: Agreed.

MR. TOBIN: Thank you.

(Question from jury marked Exhibit D for identification.)

(Recess)



THE CLERK: Before the Court is *Commonwealth v. Melvin Smith* on Indictment 98-11521, argument on defendant's motion for a required finding of not guilty.

THE COURT: Mr. Carroll?

MR. CARROLL: Judge, I guess I'm going to ask the Court to reconsider. When this motion was first presented at the end of the Commonwealth's evidence, the Court allowed the motion. And I think Mr. Puleo agreed, [8] that in some ways what I would call the magic question had never been asked, and there's certainly never been a magic answer, about what the length of the barrel was. And I believe Mr. Puleo acknowledged that that, in fact, did not happen. And as a result, the Court allowed the motion for a required finding as to the '98 indictment.

Mr. Puleo then gave the court a copy of *Commonwealth v. Sperrazza*, which the Court seemed to indicate that it might be something that a jury could infer. And there is a more recent case, *Commonwealth v. Manning*, as the Court noted yesterday. And I would point out, as I did in my memorandum in support of the motion that both *Commonwealth v. DeJesus* and *Commonwealth v. Hamilton*, deal with this identical issue, but the issue in *DeJesus* and *Hamilton* was a shotgun and not a handgun. But the definition of those is all found in Chapter 269, Section 10, where a shotgun is defined as something – for the purpose of the statute, something under eighteen inches, whereas a handgun is described as something with a barrel less than sixteen inches.

So I think the kind of reasoning and thought and rationale behind *Hamilton* and *DeJesus* is fully applicable to what we have in front of us today, and that is that there's just no testimony whatsoever about the [9] length

of the barrel, and that the defendants, in fact, are entitled to a required finding, because there's nothing on which the jury could base a decision.

And when you look at the fact patterns in *Sperrazza* and in *Manning*, it's my reading of the facts in those cases that there are, I would suggest, minimal facts, but some facts, from which a jury couldn't rely to come to a conclusion or reach an inference that the barrel length was, in fact, less than sixteen inches.

In *Sperrazza*, my memory is, and I took a quick look at it again, that there's some suggestion that the defendant pulled the gun from his waistband, or something to that effect. And I think it's reasonable to infer in that situation that someone hasn't got a 16-inch barrel stuck down into his pants. And the same thing is somewhat true in *Manning*, where Manning is charged with shooting someone with a gun from the pocket of a coat. And again, the 16-inch barrel of a gun doesn't – there's no reasonable inference that a barrel over sixteen inches is going to fit into the pocket of the coat. And from those facts, I think you may be able to draw an inference.

There isn't anything like that in the case now before the Court involving Mr. Smith. The testimony from [10] Mr. Robinson is that he sees Mr. Smith standing in the doorway with a gun in his hand and that he then sees that gun discharge and the bullets hit him. He describes that gun as revolver. But as the Court told the jury yesterday about what a firearm was, one of the things the Court said was that a firearm is a pistol or a revolver or any another weapon which can be used to discharge a bullet and has a length over – or under sixteen inches.



So the fact that someone described something as a revolver, is not determinative. It must also include the description of the length – a barrel length of under sixteen inches.

And so my argument, I guess, is that the facts in this case are not similar to *Sperrazza* or *Manning* and that there isn't anything to draw an inference from, whereas there might well have been under *Manning* and *Sperrazza* and the rationale and thinking of *DeJesus* and *Hamilton* is applicable to this case, where there's no magic question, no magic answer, and no description of the gun other than it being a revolver.

THE COURT: Thank you.

Mr. Puleo.

MR. PULEO: Thank you, Judge. Mr. Carroll's impression notwithstanding, it's still the Commonwealth's [11] position that *Sperrazza* is the controlling statement of the law in this area from the Supreme Judicial Court. There have been a series of Court of Appeals decisions since then. Understandably, many of the cases turn on their facts. And as a matter of fact, *Sperrazza* has been cited repeatedly for the proposition that whether a gun in question fits the statutory definition of requirements of what a firearm is, in fact, a question of fact for the jury.

It's clear that what Mr. Carroll has referred to as the one magic question, "Is the barrel length less than sixteen inches or not?" is not a requirement, notwithstanding Mr. Carroll's statement. I think *Sperrazza* made that clear, and all the cases since then. I did have an opportunity –

THE COURT: I don't think he was arguing that so much. I think he said truly that was not asked, and the

parties agreed to that. Then the next step is, is there sufficient circumstantial evidence for a jury to draw a reasonable inference that, in fact, this item had a barrel less than sixteen inches.

MR. PULEO: Right. And I was able, between our discussion yesterday and today, to Shepardize the *Sperrazza* case. It's cited with approval in a number of [12] a [sic] cases. Many of the cases deal with the question of the operability of the firearm in question. Clearly, I think it's fair to say that we don't have that issue here.

THE COURT: Correct.

MR. PULEO: But my bottom-line assertion is that *Sperrazza* is still good law. I note the applicable language of *Sperrazza*, while it is true – and if I may read from the *Sperrazza* opinion, and I'm on the last page of the opinion, where the SJC says, "Whether a gun is a firearm, as defined, is a question of fact for the jury." And they cite *Bartholomew*, ". . . the defendant contends that there was no evidence as to the length of the barrel. We disagree. DeVingo," who apparently was the witness in the case, D-E, capital V, -I-N-G-O, "DeVingo testified that he saw the defendant, quote, reach in back of his coat and draw a revolver, that it was a handgun and was sort of large, dark, black, I think, it was. Another witness referred to it as a handgun. A ballistics expert testified that the fact that no shell casings had been found indicated that a revolver had been used.'"

Then the court goes on to say in the next paragraph, in their conclusion, "In ordinary usage, a revolver is a species of pistol or a handgun. All are [13] short firearms. We think that the jury could conclude beyond a reasonable



doubt that the gun in question was not a weapon with a barrel sixteen inches long or longer."

The court doesn't say – as the *Manning* Court of Appeals opinion suggests, explicitly relies on the fact that the gun was in this trench coat pocket. The *Sperrazza* case does not say anything about, well, since the weapon in question was pulled from a coat, that's the significant factor. They seem to focus on the ordinary usage of the term revolver.

I also note for the Court *Commonwealth v. Sylvester*. That's at 35 Mass. Appellate Court, at page 906. And in that case, again the question was, was the weapon a firearm as defined in Chapter 140, Section 121. In *Sylvester*, the victim testified that the person who shot him used a hand-held weapon which he thought was a .25-caliber Beretta automatic. And the Court there says, "The jury could infer from that testimony that the assailant who fired the shots was using a handgun. It was not necessary to wheel up an expert."

And at the very least, we have as much evidence in this case as we do in *Sylvester*. As I indicated, my recollection of the testimony is that Mr. Robinson [14] himself laid some foundation for familiarity with handguns because his father was, I think he said, a collector, and so he was familiar with handguns, generally. He estimated the handgun to be either a .32- or .38-caliber. He identified the weapon as a revolver and described how the barrel of the revolver turns as opposed to a magazine – or an automatic that has a clip or a magazine.

I believe it was Detective Smith, I'm not certain, but I know one of the officers – I'm pretty sure it was the detective in charge of the case, Tony Smith – explained to

the jury the distinction between a revolver and an automatic. And while there were was – many witnesses questioned about the lack of any ballistic evidence at the scene, the upshot, I suggest, of their testimony was that since the report was that it was a revolver, it's not surprising that we're not finding casings, because revolvers don't eject casings.

And one of the cases that cites *Sperrazza* with approval is *Commonwealth v. Sampson*. That's at 383 Massachusetts Reports, at page 750. The page that I'm quoting from is page 761. And again, that is actually the case that talks about whether a flare gun, I think, is a weapon that falls within the statute. And in [15] passing, the SJC notes, "We have often stated that whether a gun is a firearm, under Chapter 140, Section 121, is a question of fact for the jury. We have done so in the context of conventional firearms only when either the firing capability or the length of its barrel was an issue." Then they say a flare gun is another thing and that might be subject to a ruling as a matter of law.

And the reason I mention that case is because, of course, the context that we're in now is viewing the evidence in the light most favorable to the prosecution. And I think clearly, given the Sperrazza case, the Sylvester case, and the Watts case, which is 22 Mass. Appellate Court, page 952 –

THE COURT: Well, that distinguishes *Sperrazza*, the Watts case, and it says that you need something more than the fact that the gun was concealed under a coat. That would be insufficient, even though it may be more likely than not that the barrel was less than sixteen



inches. But the court there said that the burden of proof required something more than that.

MR. PULEO: On those facts –

THE COURT: And so it distinguished *Sperrazza*, saying that if we're leaving it up to inferences, there has to be something that a jury could reasonably infer, [16] not guess, not speculate, but reasonably infer.

MR. PULEO: I agree with the Court's statement of the decision in *Watts*. But in their process of distinguishing *Sperrazza*, that is, that *Sperrazza* is enough, in *Watts* we don't have enough, what they cite as enough in *Sperrazza*, I submit, is – unlike *Sperrazza*, they say, ". . . in which witnesses described the gun they saw as a revolver and a handgun and a ballistics expert testified concerning the significance of the absence of shell casings." That's all the facts they say to explain why *Sperrazza* is different than *Watts*, the case before it.

And so it seems to me, given all those factors, that it is reasonable for this jury to conclude that the weapon that Mr. Smith – if, in fact, they find Mr. Smith is the shooter, obviously – that the weapon he used was a firearm. I think there is sufficient circumstantial evidence that it would not be mere conjecture or speculation. It would be a reasonable inference from the evidence. Mr. Robinson did testify that Mr. Smith held the gun in one hand, he had it in his right hand, and he lifted it up to his waistband and fired three shots in rapid succession without any indication that he needed a second hand to wield or discharge the weapon.

[17] And I know that the Court had directed counsel's attention to *Manning* – the most recent, as far as I'm

aware, case on this issue. And again, while *Manning* has the additional fact of the trench coat pocket, there's nothing in *Manning*, either in its holding or in its discussion, albeit brief, that suggests in any way that the Court is moving away from or requiring more than the *Sperrazza* Court.

THE COURT: Well, I think what all these cases stand on is the proposition that the Commonwealth must prove the length of the barrel. Now, that can either be done by direct evidence or by circumstantial evidence. That seems to be what the state of the law is, both from the SJC's cases and the appeals court cases.

MR. PULEO: I agree with that. No question. And I think that *Sperrazza* –

THE COURT: And so the question for me, then, is, is there sufficient circumstantial evidence to leave this with the jury.

MR. PULEO: And my position is, given that we're viewing the evidence, obviously, in the light most favorable to the Commonwealth, given the holding in *Sperrazza*, where the only testimony was ". . . a handgun or revolver, large, dark black, I think," and an [18] explanation as to the significance or, if you will, insignificance of no shell casings –

THE COURT: There was ballistic expert testimony, I think, in *Sperrazza*; was there not?

MR. PULEO: They do quote the person as a ballistic expert, yes.

THE COURT: Okay.



MR. PULEO: And again, I would certainly submit while Detective Smith didn't testify to being especially trained in ballistics, he certainly testified to a lot of police experience, and he testified to familiarity with weapons, and was able to explain – unchallenged, I note, if it's believed by the jury – consistent with, I think, Mr. Robinson himself describing the distinction between revolver and an automatic and whether casings are ejected in one and not the other. And if my – they might not have been, Detective Smith and Mr. Robinson, the only witnesses to testify to that. I don't have a specific recollection. But I do recall there was not only Mr. Robinson's sharing the testimony about his familiarity with guns, but police testimony as well, about revolvers versus automatics.

Again, in *Sylvester*, all the evidence there was a hand-held weapon which the victim thought was a .25- [19] caliber Beretta automatic. In that case, the court of appeals says that's enough for a jury to infer it's a firearm under the statute. Here you have the victim saying it's either a .32 or .38 revolver, hand-held. And I think, given the light most favorable to the Commonwealth, the evidence is sufficient.

THE COURT: All right. I will take this under advisement. Thank you.

(Recess)

COURT OFFICER: Court. All rise.

(Jury enters at 3:57 p.m.)

COURT OFFICER: Court is in session. Please be seated.

THE COURT: Mr. Foreman, members of the deliberating jury and our alternates, I've received a note from the jury which states, "Could you please tell me the law on reasonable doubt?" I will reinstruct you on reasonable doubt. And again, I will quote to you from *Commonwealth v. Webster*.

"Then what is reasonable doubt? It's a term often used, probably pretty well understood, but not easily defined. It's not mere possible doubt, because

* * *

---



COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 96-11471, 98-11521
96-11797

COMMONWEALTH OF MASSACHUSETTS

v.

MELVIN T. SMITH (SUCR97-11471 and SUCR98-11521)
FELICIA BROWN (SUCR96-11797)

---

November 16, 1998
Boston, Massachusetts
Before: Donovan, J.
Day 8 – Verdict and
Jury-Waived Trial

* * *

[6] until this moment, has anyone discussed this case with anyone else? If you have, please raise your hand.

No hands have been raised.

Has anyone read anything about this case or listened in any form of media or read anything in any form of media about this case during that same time period?

No hands have been raised.

We'll send the jury back to continue with its deliberations.

COURT OFFICER: All rise. Jurors, step this way.

(Jurors exit at 9:26 a.m.)

THE COURT: You may be seated. With respect to the issue that I heard on Friday regarding the indictment for possession of a firearm, I had originally, if my recollection serves me right, allowed the motion for a required finding of not guilty, which then was reversed based upon *Commonwealth* v. *Sperrazza*. I've reviewed all of the case law that counsel has cited for me, plus other cases, and I conclude that the decision that I rendered, which denied the motion for a required finding of not guilty, will stand.

And at the conclusion of this trial, we will go [7] forward – I will hold this jury – and we will go forward with the trial. If there is a conviction on the underlying offense, then we will go forward with the trial on the fourth and subsequent offense. And as I said, I will hold the jury for that.

Please have witnesses ready to go so that we won't have to hold this jury too long, because they've been deliberating and working hard and we've had a day off, and so on and so forth. So I want to minimize the additional time that we may have to hold this jury. And I'd appreciate all counsel be ready for trial in the event that there is a finding on the underlying offense.

COURT OFFICER: All rise, please. Court is in recess.

(Recess)

COURT OFFICER: Court. All rise.

(Jurors enter at 10:44 a.m.)

COURT OFFICER: This court is open. Please be seated.



THE COURT: Members of the deliberating jury and alternates, the jury requested a copy of the statutes concerning accessory after the fact. Rather than giving you a copy of the statutes, I'm going to again read the statute to you and then I'll tell you what the elements

* * *

[14] please.

THE CLERK: Members of the jury, have you agreed upon your verdicts?

FOREMAN: Yes.

THE CLERK: May I have them, please.

(Brief pause.)

THE CLERK: Mr. Foreperson, I will begin with Melvin Smith first.

What say you, Mr. Foreperson, as to Indictment Number 96-11471, Offense 001, charging the defendant Melvin Smith with armed assault with intent to murder, is he guilty or not guilty of any offense?

FOREMAN: Guilty.

THE CLERK: Guilty of what?

FOREMAN: The offense as charged.

THE CLERK: As to Offense 002, charging the defendant Melvin T. Smith with assault and battery by means of a dangerous weapon, is he guilty or not guilty?

FOREMAN: Guilty.

THE CLERK: And as to Indictment Number 98-11521, charging the defendant Melvin T. Smith with possession of a firearm, not being at home or work, no license, is he guilty or not guilty?

FOREMAN: Guilty.

[15] THE CLERK: I will affirm the indictments on this.

Members of the jury, harken to your verdict as the Court has recorded them. You do, upon your oath, say that the defendant Melvin Smith is guilty on Indictment Number 96-11471, Offense 001, charging him with assault with intent to murder. So say you, Mr. Foreperson?

FOREMAN: Yes.

THE COURT: Armed assault with intent to murder.

THE CLERK: Yes. Armed assault with intent to murder. So say you, Mr. Foreperson?

FOREMAN: Yes.

THE CLERK: So say you, all members of the jury?

(Affirmative response.)

THE CLERK: Furthermore, you say that the defendant Melvin T. Smith is guilty of assault and battery by means of a dangerous weapon. So say you, Mr. Foreperson?

FOREMAN: Yes.



THE CLERK: So say you, all members of the jury?

(Affirmative response.)

[16] THE CLERK: Furthermore, you say on your oaths that the defendant is guilty of possession of a firearm, not being at home, work, no license. So say you, Mr. Foreperson?

FOREMAN: Yes.

THE CLERK: So say you, all members of the jury?

(Affirmative response.)

THE CLERK: What say you, Mr. Foreperson, as to Indictment Number 96-11797, charging the defendant Felicia Brown with accessory after the fact to armed assault with intent to murder, is she guilty or not guilty?

FOREMAN: Not guilty.

DEFENDANT BROWN: Thank you, people.

THE CLERK: Members of the jury, harken to your verdict as the Court has recorded them. You do, upon your oaths, say that the defendant Felicia Brown is not guilty on Indictment Number 96-11797, charging her with accessory after the fact to armed assault with intent to murder. So say you, Mr. Foreperson?

FOREMAN: Yes.

THE CLERK: So say you all, members of the jury?

* * *

[83] through print comparisons prove beyond any reasonable doubt that, in fact, this Melvin Smith, even just looking at the photo, one can readily, I submit, conclude that Melvin T. Smith is the same as this Melvin T. Smith.

And again, relative to Mr. Carroll's argument that there is no sort of correlation or interlocking of dates of arrest and dates of convictions, I beg to differ. At the very least, the CORI record verifies the dates of arrest as they travel to convictions. The two state charges include, as part of the certified copy of convictions, the indictments themselves, which clearly show the dates of offense being 2/25/90 and 9/22/90. The federal paperwork does not show the date of arrest. But again, from CORI information, as well as the testimony that was submitted by Officer Bersani, I think the Commonwealth has proven its case beyond a reasonable doubt as to a fourth offense against Mr. Smith.

THE COURT: Thank you. I've reviewed the exhibits while waiting for the fingerprinting to occur with Officer Toomey, and I've listened to Officer Toomey's testimony and the arguments of counsel, and I find the defendant guilty of a fourth and subsequent offense of possession of a firearm, not being at home or work, without a license.

* * *

[96] THE COURT: Thank you.

THE CLERK: Melvin Smith, would you please rise.

The jury having found you guilty on Indictment Number 96-11471, Offense 001 and 002, and the Court having found you guilty on 98-11521, upon consideration



of these offenses sentences you, on 96-11471, Offense 001, charging you with armed assault to murder, to the Mass. Correctional Institute at Cedar Junction for a term of not more than fifteen years nor less than twelve years. And to Offense 002, the Court, upon consideration of this offense of assault and battery by means of a dangerous weapon, sentences you to the Mass. Correctional Institute at Cedar Junction for a term of not more than ten years nor less than nine years. This sentence is to run concurrently with the sentence imposed on 001.

And as to the offense on 98-11521, upon consideration of this offense, the Court sentences you to the Mass. Correctional Institute at Cedar Junction for a term of not more than twelve years nor less than ten years. This sentence is to run concurrently with the sentence imposed on 001 of 96-11471.

You are notified of your right to appeal to the Appellate Division and you are notified of your right to

* * *

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS. SUPERIOR COURT
NO. 98-11521

COMMONWEALTH

V.

MELVIN SMITH

MOTION FOR REQUIRED FINDING

Now comes the defendant in the above-entitled matter, Melvin Smith, and moves this Honorable Court to order a finding of not guilty to enter on this indictment.

The defendant moves for a required finding on two grounds. First, the Commonwealth has not presented any evidence that the barrel of the firearm used in this case was less than sixteen inches, a necessary element of the crime. See *Commonwealth v. Hamilton*, 426 Mass. 67(1997), and *Commonwealth v. DeJesus*, 44 Mass. App. Ct. 349(1998). In accord, *Commonwealth v. Muse*, 35 Mass. App. Ct. 466. In the *DeJesus* case the only evidence offered regarding the firearm was the victim's statement that the firearm was a shotgun. In order for the statute to apply there needed to be evidence presented that the length of the barrel was "less than eighteen inches". When no such evidence is produced it is error to deny the defendant's Motion for Required Finding.

In the case now before the court, the only evidence regarding the firearm was Mr. Robinson's testimony that he observed a .32 caliber revolver in Mr. Smith's hand. No further description was given of the gun, not even whether the barrel was long or short. Under these circumstances the defendant is entitled to a required finding of not guilty as to this indictment.



The second basis for the Motion For Required Finding is that the defendant is charged with a violation of G. L. c269, section 10(a), possession of a firearm, not at home or work. The evidence in this case does not show the defendant is not entitled to the exemption provided by G.L. c269, section 10(h), in that the testimony supports one of two propositions, either of which results in the entry of a not guilty finding as Mr. Smith was 'at home' at the time of the alleged violation.

Mr. Robinson testified that Mr. Smith was 'staying' at 33 Lawn Street, third apartment, at the time of the shooting. When Mr. Robinson was asked who was staying at that address during the time he was staying there, he listed the following people: Romanis Charles, himself, Felicia Brown and Melvin Smith. If in fact Mr. Smith was staying at 33 Lawn Street, then he was at home at the time of the alleged possession and is entitled to a not guilty finding. Even if the stay was temporary, Mr. Smith is entitled to the same outcome. In cases such as *Commonwealth v. Brass*, 42 Mass. App. Ct. 88(1997), it has been the suggestion of the appellate courts that a temporary visitor is still entitled to the rights and privileges of calling his temporary shelter his home. The United States Supreme Court and the Supreme Judicial Court have held that a hotel guest has a reasonable expectation of privacy during during the time of his authorized occupancy. See *Stoner v. California*, 376 U.S. 483(1964), and *Commonwealth v. Paszko*, 391 Mass. 164(1984).

If Mr. Smith is not entitled to the 'at home' exception suggested by Mr. Robinson's testimony that Mr. Smith was staying at that location, then Mr. Smith is entitled to a finding of not guilty on the basis of being a guest in the home of Felicia Brown. The evidence in the case is clear that Mr. Smith was on the premises legally and with the consent, and at the invitation of Ms. Brown. He is, at worst, her guest. Ms. Brown could not be found guilty of a violation of section 10(a) for the actions attributed to Mr. Smith. As Ms. Brown's guest, neither should Mr. Smith. Just as hotel guests are given constitutional rights while they are lawfully on the premises, so too should a guest be afforded the same protections as the resident of a home. In G.L. c278, section 8A (the so-called 'castle' statute), the legislature set out an exception to the flight rule before defending oneself. It gives the resident a defense if the "... occupant was in his dwelling at the time of the offense." It is unimaginable that the legislature did not intend a resident's legitimate guest in the dwelling to have the same protection and the same defense. So too should a lawful guest have the same rights and protections as the resident under the statutory scheme contained in G.L. c269, section 10(a), and 10(h). It would be anomalous for the legislature to criminalize the conduct of a guest in possession of a homeowner's firearm when the host's identical conduct would not be criminal, or subject to the same punishment.

For the foregoing reasons, the defendant's Motion For Required Finding should be allowed.



Respectfully submitted,

/s/ Bruce W. Carroll
Bruce W. Carroll
50 Beacon Street, 2d Floor
Boston, Ma. 02108
720-1413
BBO# 075840

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss. SUPERIOR COURT
DEPARTMENT OF THE TRIAL
COURT, FOR THE TRANSACTION
OF CRIMINAL BUSINESS

November Sitting, A. D. 1998

No. SUCR98-11521-001 – Possession Of Firearm, Not Being At Home Or Work, No License

**VERDICT SLIP**

COMMONWEALTH vs. Melvin T. Smith

In the above-entitled case, the jury say that the defendant is

1. ____ NOT GUILTY
2. ✓ GUILTY OF OFFENSE AS CHARGED

and this is their verdict.

/s/ Leon Edwards 11/16/98
Foreperson

November ___, 1998

---



**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.** **SUPERIOR COURT**
**CRIMINAL ACTION**
**NO. 96 SUCR 11471**
**98 SUCR 11521**

**COMMONWEALTH OF MASSACHUSETTS**

**vs.**

**MELVIN T. SMITH**

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL**

## INTRODUCTION

Defendant Melvin T. Smith ("Smith"), convicted on charges of assault with intent to murder, assault and battery by means of a dangerous weapon, and unlawful possession of a firearm (fourth offense), has filed the instant motion for a new trial pursuant to Mass.R.Crim.P. 30(b). Smith, through counsel, asserts that the trial judge committed eight separate errors which necessitate a new trial.

For the reasons set forth below, the defendant's motion for a new trial is **DENIED.**

## BACKGROUND

On November 16, 1998, a Suffolk Count [sic] jury convicted Melvin T. Smith of armed assault with intent to murder, G.L. c. 265, § 18, assault and battery by means of a dangerous weapon, G.L. c. 265, § 15A, and unlawful possession of a firearm. G.L. c. 268, § 10. Subsequent to the convictions, the court proceeded to trial on the second

and subsequent portion of the unlawful possession of a firearm indictment. Following the jury-waived trial, the court convicted Smith of a fourth offense of unlawful possession of a firearm. G.L. c. 269, § 10(d). It is from these convictions that Smith has filed his motion for a new trial. Mass.R.Crim.P. 30(b).

The victim in the instant case, Christopher Robinson ("Robinson"), was the first cousin of Felicia Brown ("Brown"), the then-girlfriend of Smith. Brown and Robinson were close, and often visited each other. In August 1996, Brown's mother traveled out of town for two weeks and allowed Robinson to stay with Brown at her house while she was away.

It was during this time that Robinson became acquainted with Smith. The two men allegedly had a friendly relationship and often spoke. On August 15, 1996, Robinson had spent the day drinking. Over the course of twelve hours, he had consumed a fifth of vodka and at least forty ounces of beer. Later that same day, Robinson, Brown, and Smith all ate dinner together. There was no evidence of any malevolent behavior by any one party against any other.

At approximately 4 a.m., Robinson walked downstairs. When he reached the bottom of the staircase, he saw Smith and Brown in Brown's bedroom. Smith, according to Robinson, was holding "a pistol," which appeared to be either "a .32 or a .38." Smith fired the gun, hitting Robinson three times. Smith then turned to Brown and said, "let's go," in an effort to leave the house. Robinson then said, "I know who you are, Melvin. Why you shoot me? Why you shoot me? I know who you are. You[r] name is Melvin." Robinson stated that Brown said, "His last name



is Smith." Brown and Smith left the house, while Brown's step-father, who had heard the three shots, called for assistance.

Boston Police Officer Wayne Clark ("Clark") responded to the 911 call. When Clark asked Robinson who had shot him, Robinson responded, "Melvin." When Clark asked for Melvin's last name, Robinson stated that he did not know it. Robinson did tell Clark that Melvin was Brown's boyfriend.

Robinson was transported to Brigham & Women's Hospital, where he underwent surgery. By September 7, 1996, Robinson was still on a ventilator, but was able to communicate non-verbally. Robinson was asked by a Boston detective to look at a photo array and identify the person who shot him. Robinson was able to identify Smith.

Robinson testified at Smith's trial. Following Smith's convictions, Robinson died due to liver damage that resulted from the gun shot wounds. Subsequently, a Suffolk Count Grand Jury indicted Smith on murder charges. That trial has yet to occur.

## DISCUSSION

"The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." Mass.R.Crim.P. 30(b). A motion for a new trial is addressed to the sound discretion of the judge, and the judge's disposition of the motion will not be reversed unless it is manifestly unjust or unless the trial was infected with prejudicial constitutional error. See *Commonwealth* v. *Moore,* 408 Mass. 117, 125 (1990) (internal citations omitted).

In the instant case, Smith raises eight issues in which he alleges error. Specifically, Smith contends that: (1) Smith's joint trial with non-testifying co-defendant Brown deprived Smith of his constitutional right to confront and cross-examine his accusers, particularly where Robinson testified to a statement of Brown's which identified Smith as the shooter; (2) Brown presented an antagonistic defense whereby, at the last minute, she accused Smith of being the shooter and of menacing Brown into covering for him; (3) Smith was deprived of his constitutional right to counsel where the trial judge answered nine questions from the jury without first giving counsel an opportunity to be heard; (4) Smith was placed in double jeopardy where the trial judge allowed Smith's motion for a required finding of not guilty on the possession of a firearm indictment at the close of the Commonwealth's case, but then "reinstated" the charge after Smith had rested; (5) Smith was deprived of his right to an impartial jury when counsel for Brown exercised peremptory challenges in a discriminatory manner; (6) the jury was erroneously instructed on excessive force in self-defense because the instruction misplaced the burden of proof; (7) Smith was deprived of his due process rights where his conviction for possession of a firearm (fourth offense) rested on insufficient evidence; and (8) Smith was deprived of a fair trial where a crucial witness to the identification issue gave trial testimony which was materially different from her voir dire testimony.

At trial, counsel for Smith objected and preserved for appeal only two of the aforementioned issues; issues four and eight. Therefore, this memorandum addresses the merits of only Smith's double jeopardy argument and Smith's contention that a crucial identification witness



gave trial testimony that was materially different from her voir dire testimony. Issues one, two, three, five, six, and seven were not objected to at trial, are deemed waived, and this court expressly declines to resurrect them. See *Commonwealth* v. *Sowell,* 34 Mass. App. Ct. 229, 230-231 (1993) (no resurrection where trial judge expressly stated he was not addressing certain issues in motion for new trial where issues could have been raised either at trial or in direct appeal).

## I. "Reversal" of the Allowance of Smith's Motion for Required Finding of Not Guilty on the Firearms Offense.

Smith contends that the court erred in "reversing" its allowance of the defendant's motion for a required finding of not guilty on the firearms offense. During trial, after the Commonwealth had completed its case, the court allowed Smith's motion for a required finding of not guilty on the firearms charge. However, after the defendant's case, the court, relying on *Commonwealth* v. *Sperrazza,* 372 Mass. 667 (1977), withdrew its allowance of Smith's motion and allowed the firearms charge to go to the jury.[1] Smith was subsequently convicted on the charge. In seeking a new

[1] At issue in Smith's trial with respect to the firearms charge was the length of the weapon's barrel. The Commonwealth was required to prove that the barrel was less than sixteen inches. G.L. c. 269, § 10(a); G.L. c. 140, § 121. At trial, Robinson testified that the weapon was "a pistol," and "a .32 or a .38." In *Commonwealth* v. *Sperrazza,* 372 Mass. 667 (1977), which the court finds apposite in this case, the Supreme Judicial Court held that a jury may infer that a barrel was less than sixteen inches where there was testimony that the gun was a "revolver" or a "handgun" even though no evidence as to the barrel's length was presented.

trial, Smith contends that the court's allowance, and then subsequent withdrawal of the allowance, placed Smith in double jeopardy, in violation of Smith's constitutional rights. There was no error.

A criminal defendant has a constitutional right not to be placed in jeopardy twice for the same offense. *Commonwealth* v. *Lowder,* 432 Mass. 92, 103 (2000). When a defendant has been put in jeopardy for an offense and acquitted, he may not be retried for that offense. *Id.* The defendant, relying on the above-stated rule, contends that the allowance of the motion, and then the subsequent withdrawal of it later in the trial, placed him in double jeopardy because upon the court's allowance of the motion, jeopardy terminated as to that charge. See *Lowder,* 432 Mass. at 103. At first blush, Smith's argument appears to have merit, but crumbles when viewed with an eye towards the policy reasons behind double jeopardy.

The United States Supreme Court traced the development of the double jeopardy clause in the constitution, and noted that "[a]t the heart of the policy is the concern that permitting the sovereign freely to subject the citizens to a second trial for the same offense would arm Government with a potent instrument of oppression." *United States* v. *Martin Linen Supply Co.,* 430 U.S. 564, 568-569 (1977). The clause, the Court held, was enacted so that the State may not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense, and causing him to live in a state of anxiety and insecurity, all the while wondering if he may be found guilty or innocent. *Id.* at 569. However, where there are no threats of successive prosecution, the double jeopardy clause is not offended. *Id.* at 569-570.



The instant case is, in principle, analogous to the situation where a jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal. In such a case, an appeal by the government is permitted because a conclusion by an appellate court that the judgment of acquittal was improper does not require the defendant to submit to a second trial; the error can be corrected on remand by the entry of judgment on the verdict. See *United States* v. *Jenkins,* 420 U.S. 358, 365 (1975), *overruled on other grounds, United States* v. *Scott,* 437 U.S. 82 (1978); *Commonwealth* v. *Elder,* 389 Mass. 743, 749 (1983). In the instant case, Smith was not and would not have been, required to submit himself to a second trial. The erroneous allowance of the motion for a required finding of not guilty was corrected before closing arguments, and Smith's counsel had the option to seek a re-opening of the evidence. Smith's counsel did not do so, and it is unlikely he could have produced evidence disputing the length of the firearm used in the shooting because any evidence with respect to Smith's knowledge of the firearm's length would be an implicit admission that he used and/or possessed the weapon.[2]

---

[2] Indeed, a trial judge has discretion to re-open evidence when mere inadvertence or some other compelling circumstance . . . justifies a re-opening and no substantial prejudice will occur. *Commonwealth* v. *Cote,* 15 Mass, App. Ct. 229, 241 (1983). In *Cote,* the trial judge allowed the re-opening of the Commonwealth's case after it rested, and after the defendant had moved for a required finding of not guilty. *Id.* at 238-240. The Appeals Court held that in so doing, the trial judge did not commit error because the failure to provide evidence with respect to a particular issue stemmed from a good faith, albeit erroneous, belief by the Commonwealth that a particular burden of proof rested with the defendant, and by allowing the Commonwealth to put on evidence to establish what it was required to prove did not prejudice the defendant. *Id.* at 242-243. Similarly, as noted above, in this case, Smith suffered no

(Continued on following page)

Although no reported Massachusetts case reflects the facts herein, an analogous decision supporting the Commonwealth's contention that the double jeopardy clause did not bar the submission to the jury of the firearms offense is *Commonwealth* v. *Ierardi,* 17 Mass. App. Ct. 297 (1983). In that case, after the defendant was found guilty of the substantive portions of a firearms offense, the Commonwealth introduced evidence of prior convictions in an effort to prove that it was the defendant's third such offense. The defendant moved for a required finding of not guilty, and the trial judge allowed the motion because the Commonwealth had failed to establish that the defendant was the same person named in the prior two convictions, *Id*. at 303. The Commonwealth then moved to re-open its case, informing the judge that it had intended to call the defendant's counsel on the two prior convictions as a witness to establish the necessary identification but had not done so because current defense counsel had agreed to stipulate to identity. Defense counsel acknowledged the stipulation, and the judge allowed the Commonwealth to re-open its case to admit the stipulation. The Appeals Court held, without elaborating, that on those facts there was no violation of the defendant's right not to be put twice in jeopardy. *Id*.

Smith's reliance on *Lowder,* 432 Mass. 92, and *Commonwealth* v. *Super,* 431 Mass. 492 (2000), is misplaced because in those cases, dismissal on double jeopardy grounds was upheld because retrial of the defendant would have required the empaneling of a second jury. In this case, where Smith was convicted by the same jury

---

prejudice by the court's "reversal" of its allowance of a required finding of not guilty.



that first heard the evidence against him, and no second jury was needed, Smith was not placed in double jeopardy in violation of his constitutional rights.

## II. The Identification Witness' Trial Testimony

Smith contends that an unfair surprise occurred because Nurse Diane Tavares ("Tavares"), one of Robinson's hospital caretakers, changed her testimony with respect to Robinson's hospital room identification of Smith, and that the Commonwealth knew about the testimony and failed to disclose it. The Commonwealth, however, contends that Tavares' testimony did not change, and this court agrees.

During the voir dire, Tavares testified with respect to Robinson's ability to identify the shooter based on the photo array presented to Robinson by the Boston police. Tavares testified that Robinson "was able to physically point with a hand." She further stated that "[Robinson] just pointed [to the pictures] with his finger," and that he was capable of holding a marker, but was not holding one.

At trial, Tavares testified that Robinson, due to a condition known as "wrist drop," was unable to grasp with "fine motor movement" and, thus, could not write. She testified, however, that while the condition did not prevent him from pointing to words on a communication board, it did prevent him from writing. On cross-examination, Tavares testified that Robinson was capable of holding a marker, but could not write. She stated, "[h]e could hold it, but he couldn't – he can't write. He couldn't write with it, he could hold it." Tavares further noted that Robinson could have drawn a "very big" circle, had he been holding a marker.

Thus, at both the voir dire and trial, Tavares testified that Robinson could hold a marker, but that he could not write with it.[3] Smith's assertion of unfair surprise fails because Tavares' testimony did not change, and Smith's motion for a new trial on this point, and his motion for an evidentiary hearing, is denied.

**ORDER**

Accordingly, it is **ORDERED** that the defendant's motion for a new trial is **DENIED.**

/s/ Elizabeth Bowen Donovan
Elizabeth Bowen Donovan
Justice of the Superior
Court

DATED: June 25, 2001

[3] This court fails to see how the inability to hold a marker would have cast doubt on Robinson's photo identification of Smith. The evidence at trial was that Robinson identified Smith by pointing with his finger, not by using a marker. In any event, the ability to write and the ability to draw a "very big" circle are separate skills and are not inconsistent.



COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, ss. NO: 00-P-1215

COMMONWEALTH
(Plaintiff/Appellee)

v.

MELVIN T. SMITH
(Defendant/Appellant)

ON APPEAL FROM JUDGMENTS OF THE
SUFFOLK DIVISION OF
THE SUPERIOR COURT DEPARTMENT

# CONSOLIDATED BRIEF AND RECORD APPENDIX FOR THE DEFENDANT

for the defendant/appellant
David J. Nathanson
BBO #633772
Committee For Public Counsel Services
44 Bromfield Street
Boston, MA 02108
617-988-8309

October 29, 2001

* * *

## ARGUMENT

### I. REINSTATEMENT OF THE FIREARMS OFFENSE AFTER SMITH RESTED HIS CASE VIOLATED SMITH'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO NOT BE PLACED IN JEOPARDY TWICE FOR THE SAME OFFENSE WHERE THE JUDGE HAD TIMELY ALLOWED SMITH'S MOTION FOR A REQUIRED FINDING AT THE CLOSE OF THE COMMONWEALTH'S CASE.

At the close of the Commonwealth's case, the court allowed Smith's motion for required finding as to the firearms charge. (Tr. 6:67). The judge properly denied the Commonwealth's motion to reopen the evidence. *Id.*; *Commonwealth v. Zavala*, No. 98-P-2114 (Mass. App. Ct. October 10, 2001); *contrast Commonwealth v. Ierardi*, 17 Mass. App. Ct. 297, 303 (1983).[10] *After Smith had rested*, the prosecutor, relying on *Commonwealth v. Sperazza*, 372 Mass. 667 (1977), convinced the judge to "reverse" its allowance of Smith's motion for a required finding on the firearms charge. (Tr. 6:124). The judge allowed the charge to go to the jury and reserved any additional ruling on the motion. (Tr. 6:125).[11]

[10] This is not a case like *Ierardi*, 17 Mass. App. Ct. 297, where the defendant obtained a required finding by agreeing with the prosecutor to stipulate to the barrel length but did not timely inform of the stipulation.

[11] The judge's reversal and "reservation" of decision on the defendant's motion for required finding were also clearly improper under Mass. R. Crim. P. 25(a). To wit, "[i]f a defendant's motion for required finding is made at the close of the Commonwealth's evidence, *it shall be ruled upon at that time.*" *Id.* (emphasis added).



When the judge allowed Smith's motion for required finding, jeopardy terminated as to that charge. *United States v. Martin Linen*, 430 U.S. 564 (1977). Once granted, a motion for required finding at the close of the Commonwealth's case cannot be reversed regardless of whether the court was factually or legally in error in granting the motion.[12] Therefore, the Court must order a judgment of acquittal on that indictment. Further, the firearm indictment surely intertwined in the minds of the jurors with the *armed* assault with intent to murder indictment. *Commonwealth v. Cogswell*, 31 Mass. App. Ct. 691, 699 (1991) (erroneous exclusion of impeachment of one complainant required reversal of related indictment against different complainant). Therefore, a new trial must be ordered as to the latter indictment as well.

* * *

[12] *Commonwealth v. Therrien*, 383 Mass. 529, 535-36 (1981) (preverdict required finding of not guilty terminates jeopardy and bars any further proceedings); *Fong Foo v. United States*, 369 U.S. 141 (1962) (egregious error of trial judge in directing verdict for defendant before close of government's case nevertheless terminated jeopardy and further proceedings prohibited); *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986) ("whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause"); *Arizona v. Rumsey*, 467 U.S. 203, 211-212 (1984) (same); *People v. Strong*, 472 N.E.2d 1152 (Ill. App. Ct. 1984) (consistent with double jeopardy "trial court . . . may not withdraw an order directing a verdict and permit the jury to make a finding on the charge"); *Penn v. State*, 945 S.W.2d 397 (Ark. Ct. App. 1997) (inadvertent grant of directed verdict in bench trial terminated jeopardy and further proceedings barred); *Commonwealth v. Lowder*, 432 Mass. 92 (2000).

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, ss. NO: 00-P-1215

---

COMMONWEALTH
(Plaintiff / Appellee)

v.

MELVIN T. SMITH
(Defendant / Appellant)

---

ON APPEAL FROM JUDGMENTS OF THE
SUFFOLK DIVISION OF
THE SUPERIOR COURT DEPARTMENT

---

# REPLY BRIEF FOR THE DEFENDANT

---

for the defendant/appellant
David J. Nathanson
BBO #633772
Committee For Public Counsel Services
44 Bromfield Street
Boston, MA 02108
617-988-8309

February 28, 2002

* * *



[1-5]

## ARGUMENT

### I. SMITH WAS IMPERMISSIBLY PLACED TWICE IN JEOPARDY WHERE THE TRIAL JUDGE ALLOWED SMITH'S MOTION FOR A REQUIRED FINDING OF NOT GUILTY AND THEN "REINSTATED" THE PROSECUTION ONLY AFTER THE EVIDENCE WAS CLOSED AND THE CHARGE CONFERENCE WAS COMPLETED.

The Commonwealth argues Smith's right against double jeopardy was not violated because a second jury was not empanelled after the judge entered a required finding of not guilty and then reinstated the prosecution. (Comm. Br. at 19). The judge's ruling violates the prohibition against double jeopardy because the finding of not guilty was final, not interlocutory and barred further proceedings. *United States v. Blount*, 34 F.3d 865, 868 (9th Cir. 1994). The judge denied the Commonwealth's motion to reopen, indicating that the matter was settled. (Tr. 6:67); (Def. Br. at 17); (A.21) (motion for required finding endorsed "allowed" and attested). The prosecution was resurrected only after Smith had rested his defense on the assault with intent to murder and assault and battery by means of a dangerous weapon charges, after a recess, and after completion of the charge conference. (Tr. 6:122-24). *Contrast Commonwealth v. Ierardi*, 17 Mass. App. Ct. 297, 303 (1983) (no double jeopardy violation where counsel immediately alerted court to oversight in failing to introduce stipulation as to barrel length). The federal cases relied upon by the Commonwealth offer it no assistance. (Comm. Br. at 21). The prohibition against double jeopardy is violated where the order of acquittal was not "tentative

or subject to reconsideration."[1] *Blount*, 34 F.3d at 868. Here, the judge immediately denied the prosecutor's motion to reopen and restated her allowance of the motion for a required finding of not guilty. (Tr. 6:67). There was nothing tentative or interlocutory about the judge's ruling. *Contrast United States v. Byrne*, 203 F.3d 671, 674 (9th Cir. 2001) (motion for acquittal granted "unless I can be convinced otherwise"); *contrast United States v. Baggett*, 251 F.3d 1087, 1094 (6th Cir. 2001) (not clear whether motion was allowed or held in abeyance). Further, the trial court in those cases "immediately" reconsidered its order rendering it non-final. *Byrne*, 203 F.3d at 671; *see United States v. Washington*, 48 F.3d 73, 79 (2d Cir. 1995); *United States v. Rahman*, 189 F.3d 88, 133 (2nd Cir. 1998) (order reconsidered prior to further proceedings).

The Commonwealth rejects the persuasive authority cited by Smith merely because some of it is "out-of-state intermediate appellate court cases". (Comm. Br. at 21). It is ironic that the Commonwealth argues to the Massachusetts intermediate state appellate court that precedent from parallel courts is not worthy of consideration. Smith refers the Court to *State v. Blacknall*, 672 A.2d 1170, 1174-75 (N.J. Super. App. Div. 1995), wherein the New Jersey intermediate appellate court rejected the federal intermediate appellate authorities relied upon the Commonwealth.[2]

[1] The judge's reconsideration was clearly impermissible under Mass. R. Crim. P. 25(a). (Tr. 6:124). Rule 25 requires that the motion judge rule on a motion for required finding *at the time that it is made*. Mass. R. Crim. P. 25(a); *Contrast Byrne*, 203 F.3d at 675 (reconsideration not error under Fed. R. Crim. P. 29 where rule explicitly permits judge to reserve ruling).

[2] The federal cases relied upon by the Commonwealth are a line of authority derived from *United States v. LoRusso*, 695 F.2d 45, *cert.*

(Continued on following page)



The reinstatement of the prosecution after the close of evidence and after the charge conference, (Tr. 6:119), deprived Smith of the ability to argue his requests for jury instructions regarding the firearms charge. *Contrast Byrne*, 203 F.3d at 675 (ruling was interlocutory and reconsideration proper where court informed counsel that jury instructions on acquitted count should still be submitted); *see United States v. Parent*, 954 F.2d 23, 26 (1st Cir. 1992) (constitution requires counsel be given opportunity to address instructions prior to court giving them).

Those cases relied upon by the Commonwealth discussing government appeals of orders of acquittal *after* the jury returned a guilty verdict are inapposite. (Comm. Br. at 19). Here, the defendant was *first* acquitted and then unconstitutionally subjected to further factfinding resulting in conviction. *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986). The fact that a judge entered the acquittal rather than a jury is irrelevant, *id.*, the relevant inquiry is whether the *first* factual resolution of the case resulted in acquittal. Thus, the policy considerations at issue in the cases relied upon by the Commonwealth simply are not present here.

* * *

*denied sub nom Errante v. United States*, 460 U.S. 1070 (1983). *LoRusso* does not support the Commonwealth's position. There, no double jeopardy violation was found because the government was allowed to proceed on a *lesser included* offense after the motion for acquittal had been allowed on the primary offense. *Id.* at 52. This is fundamentally different than reconsidering the acquittal on the primary offense. *Baggett*, 251 F.3d at 1098 (Aldrich, J. dissenting).

**COMMONWEALTH vs. MELVIN T. SMITH.**

**No. 00-P-1215**

**APPEALS COURT OF MASSACHUSETTS**

***58 Mass. App. Ct. 166; 788 N.E.2d 977; 2003 Mass. App. LEXIS 578***

**October 16, 2002, Argued**

**May 21, 2003, Decided**

**SUBSEQUENT HISTORY:**

As Corrected July 10, 2003.

**PRIOR HISTORY:**

Suffolk, Indictments found and returned in the Superior Court Department on September 26, 1996, and October 8, 1998. The cases were tried before Elizabeth B. Donovan, J., and a motion for a new trial, filed on February 14, 2001, was heard by her.

**DISPOSITION:**

Judgments affirmed; order denying motion for a new trial affirmed.

**COUNSEL:**

David J. Nathanson, Committee for Public Counsel Services, for the defendant.

Joseph M. Ditkoff, Assistant District Attorney, for the Commonwealth.



**JUDGES:**

Present: Cypher, Smith, & Grasso, JJ.

**OPINION BY:**

CYPHER

**OPINION:**

CYPHER, J. The defendant, Melvin T. Smith, appeals from his convictions for assault with intent to murder, G.L. c. 265, § 18, assault and battery by means of a dangerous weapon, G.L. c. 265, § 15A, and unlawful possession of a firearm, fourth offense, G.L. c. 269, § 10. The defendant also appeals from the denial of his motion for a new trial.

1. Factual background. A jury could have found the following facts. Codefendant Felicia Brown lived with her mother, stepfather, and two siblings in a three-story building at 33 Lawn Street, in the Jamaica Plain section of Boston.[1] The Brown family occupied part of the second floor of the building and all of the third floor, and rented part of the second floor and all of the first floor to tenants.[2]

---

[1] Brown was indicted on charges of being an accessory after the fact and perjury. The perjury indictment was severed. Brown was tried with the defendant on the accessory after the fact indictment and was acquitted. Following a separate trial, Brown was convicted on the perjury charge; the conviction was later reversed by this court. *Commonwealth v. Brown*, 55 Mass.App.Ct. 440, 771 N.E.2d 214 (2002).

[2] Patrick Veridieu lived in the first floor apartment and Elaine Shaw lived in the second floor apartment.

On August 15, 1996, Christopher Robinson, Brown's cousin, spent the day sitting around the house, drinking alcohol, and smoking marijuana and crack cocaine. At approximately 4:00 A.M., Robinson went from the third floor to the second floor downstairs to lie down. When he reached the bottom of the stairs, he saw Brown and the defendant in Brown's bedroom. The defendant was holding what appeared to be a .32 or .38 caliber pistol.

Robinson testified that as he descended from the third to the second floor, the defendant shot him three times. The defendant said to Brown, "let's go." Robinson said, "I know who you are, Melvin. Why you shoot me? Why you shoot me? I know who you are. Your name is Melvin."[3]

Brown and the defendant left the house. Robinson sought help from Brown's stepfather, who telephoned the police. The police and paramedics arrived within moments of each other.

While the paramedics attended to Robinson, Boston police Officer Wayne Clark asked Robinson who shot him. Robinson replied, "Melvin." Officer Clark asked for a last name, but Robinson said he did not know it. Officer Clark asked Robinson how he knew Melvin, and Robinson told him that Melvin was his cousin's boyfriend.

The shooting severely injured Robinson and destroyed his digestive tract. While in the hospital, Robinson selected a photograph of the defendant from a photographic array and identified the defendant as the person who shot

[3] Immediately after the shooting, Robinson told the police that he did not know Melvin's last name. At trial, however, Robinson testified that Brown had said, "His last name is Smith," as she left the house.



him. At trial, Robinson identified the defendant as his assailant.

On August 25, 1996, Boston police Detective Tony Smith interviewed Brown in the presence of her mother. Brown said that she and the defendant had left because Robinson had been acting crazy and "busting up" the house. Brown told Detective Smith that at the time of the shooting, the defendant was in his car and that she had just approached the house. She said that she heard the gunshots as she walked to the door, and that she and the defendant drove away, to "Tony's." Brown cried during the interview and explained that she was under a lot of pressure. She said that she and the defendant went to a friend's house to use the phone.

The theory of the defense was that Robinson was too intoxicated by drugs and alcohol to correctly identify his assailant and that one of the tenants in the building, Patrick Veridieu, had a motive and an opportunity to shoot him.

2. Discussion. a. The motion for required finding of not guilty and double jeopardy. After the Commonwealth rested, the defendant moved for a required finding of not guilty on the charge of unlawful possession of a firearm, arguing that because the Commonwealth had not introduced direct evidence of the gun's length, the Commonwealth had not proved that the gun met the statutory definition of a firearm. The judge allowed the motion. The allowance of the motion was not communicated to the jury, but it was recorded on the docket.

Later that day, after the defense had rested and before closing argument, the Commonwealth called the judge's attention to *Commonwealth v. Sperrazza,* 372 Mass. 667,

670, 363 N.E.2d 673 (1977), in which the Supreme Judicial Court held that testimony that a gun was a pistol or revolver was sufficient evidence to permit a firearm charge to go to the jury. In light of the case law, the trial judge concluded that the Commonwealth had, in fact, met the *Latimore*[4] standard because the Commonwealth had introduced testimony that the gun was a "pistol" and that it was a ".32 or .38," from which a jury could infer that the gun was less than sixteen inches. The judge decided to submit the charge to the jury. The docket reflects that the motion for required finding of not guilty had been reconsidered and was denied.

The defendant argues that the judge erred because once the motion for a required finding was allowed, jeopardy terminated as to that charge, and the decision cannot be reversed regardless of whether the judge was factually or legally in error in allowing the motion. The Commonwealth responds that because the charge was submitted to the same jury that had heard the evidence, the defendant was not subjected to double jeopardy.

Massachusetts common law and the *Fifth Amendment to the United States Constitution* protect criminal defendants from being placed twice in jeopardy in three circumstances: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. See *North Carolina v. Pearce,* 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969); *Luk v. Commonwealth,* 421 Mass. 415, 419, 658 N.E.2d 664 (1995).

[4] *Commonwealth v. Latimore,* 378 Mass. 671, 677-678, 393 N.E.2d 370 (1979).



The defendant's argument implicates only the first circumstance, a second prosecution after acquittal. See *Commonwealth v. Lowder,* 432 Mass. 92, 103, 731 N.E.2d 510 (2000).

We conclude that double jeopardy protections were not violated in these circumstances because the judge's correction of her ruling did not require a second proceeding. See, e.g., *Commonwealth v. Haskell,* 438 Mass. 790, 792, 784 N.E.2d 625 (2003) (judge's power to reconsider his or her own decisions during pendency of case is firmly rooted in common law); *United States v. Washington,* 48 F.3d 73, 79 (2d Cir.), cert. denied, 515 U.S. 1151, 132 L. Ed. 2d 843, 115 S. Ct. 2596 (1995) (trial judge properly reversed entry of acquittal, after defense case began, where judge did so before informing jury); *United States v. Baggett,* 251 F.3d 1087, 1095 (6th Cir. 2001), cert. denied, 534 U.S. 1167, 152 L. Ed. 2d 126, 122 S. Ct. 1184 (2002) (conviction upheld where trial court entered acquittal but then submitted charge to jury because such reversal did not require retrial). See also *Price vs. Vincent, U.S. Supreme Court,* 155 L. Ed. 2d 877, 123 S. Ct. 1848, 2003 U.S. LEXIS 3678, No. 02-524, slip op. at 6-8 (U.S. May 19, 2003) (reasonable for State court to conclude that judge's comments were not sufficiently final to terminate jeopardy). Furthermore, "a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *United States v. Wilson,* 420 U.S. 332, 345, 43 L. Ed. 2d 232, 95 S. Ct. 1013 (1975).

The defendant also argues that the correction was improper under Mass.R.Crim.P. 25(a), 378 Mass. 896 (1979), because the rule requires that the judge decide a motion made at the close of the Commonwealth's evidence

at the time the motion is made.[5] The requirement of a prompt ruling "protects a defendant's right to insist that the Commonwealth present proof of every element of the crime with which he is charged before he decides whether to rest or to introduce proof in a contradiction or exoneration." *Commonwealth v. Cote,* 15 Mass. App. Ct. 229, 240, 444 N.E.2d 1282 (1983). This protection was honored. The defendant has not suggested that the initial allowance of the motion affected his trial strategy with regard to the other charges. Moreover, the Commonwealth did not introduce any additional evidence, and the defendant was provided the opportunity to reopen his case.

Additionally, the defendant has not indicated how the requirement precludes a judge from correcting a ruling. Compare *Commonwealth v. Rice,* 216 Mass. 480, 482-83, 104 N.E. 347 (1914) (no violation of double jeopardy protections by District Court judge's withdrawal of finding of guilt and declination of jurisdiction because case had not been ended at time judge withdrew guilty finding); *Fine v. Commonwealth,* 312 Mass. 252, 258, 44 N.E.2d 659 (1942) (judge has power to alter or amend his decision on motion for new trial at any time during pendency of proceedings before him).

Furthermore, the evidence was not insufficient as matter of law. Compare *Commonwealth v. Ierardi,* 17 Mass. App. Ct. 297, 303, 457 N.E.2d 1127 (1983) (no violation of right not to be put twice in jeopardy where judge indicated he would allow motion for required finding

[5] Rule 25(a) of the Massachusetts Rules of Criminal Procedure provides, "If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, *it shall be ruled upon at that time*" (emphasis added).



of not guilty but then permitted Commonwealth to reopen its case and enter stipulation into evidence). Contrast *Commonwealth v. Zavala,* 52 Mass. App. Ct. 770, 779, 756 N.E.2d 29 (2001) (Commonwealth may not reopen its case when evidence is insufficient as matter of law).

Finally, the defendant was not otherwise prejudiced by the ruling. The jury were not aware that the judge had allowed the motion and the correction of the ruling was made before closing arguments. The judge did not err by correcting her ruling in these circumstances.

b. Unlawful possession of a firearm (fourth offense). A jury-waived trial was held on the portion of the indictment which alleged that the defendant was a four-time offender of the firearms law. See G.L. c. 269, § 10,d. The defendant claims that the judge erred by relying on a Federal conviction for violating the "felon-in-possession" provisions of 18 U.S.C. § 922(g)(1) as one of the three earlier firearms convictions.

Section 10(d) of c. 269 provides:

> "Whoever, after having been convicted of any of the offenses set forth in paragraph (a), (b) or (c) commits a like offense or any other of the said offenses, shall be punished . . . for a fourth such offense. . . ."

The defendant argues that the statute does not specifically permit convictions from other jurisdictions to serve as predicate offenses under § 10(d) and that, in fact, only another conviction for a violation of § 10(d) may be a "like offense." We disagree.

The language of G.L. c. 269, § 10(d), that conviction may be for a "like offense," does not prohibit Federal

convictions from being used as predicate offenses. Contrast *Youngworth v. Commonwealth,* 436 Mass. 608, 611-612, 766 N.E.2d 834 (2002) (language in habitual offender statute requiring predicate convictions "in this or another state" precluded use of Federal conviction). Rather, the statute speaks of a "like offense."

We find no support for the defendant's claim that only another conviction for a violation of § 10(d) may be a "like offense." Had the Legislature intended such a requirement, it would have expressly stated so. *Commonwealth v. Brown,* 431 Mass. 772, 775, 730 N.E.2d 297 (2000).

The statute does not define a "like offense." Where a statutory term is undefined, we may interpret it "in accordance with its generally accepted plain meaning." *Commonwealth v. Boucher,* 438 Mass. 274, 276, 780 N.E.2d 47 (2002). The generally accepted, plain meaning of "like," in this context, means "the same or nearly the same." Webster's Third New International Dictionary 1310 (1993). See *Commonwealth v. Corbett,* 422 Mass. 391, 396, 663 N.E.2d 259 (1996) (under plain and ordinary meaning of term "like offenses," prior convictions for operating under influence were "like offenses" even though prior offenses were misdemeanors and third offense was felony, where elements remained same).

Although the elements of the Federal statute are not identical to the State statute, the offenses proscribed by both statutes are sufficiently alike to be considered "like offenses" for purposes of G. L. c. 269, § 10(d). Both statutes are concerned with keeping firearms out of the hands of those not legally entitled to possess them, in particular, people with felony convictions. See *Huddleston v. United States,* 415 U.S. 814, 824, 39 L. Ed. 2d 782, 94 S.Ct. 1262,



(1974); *Barrett v. United States,* 423 U.S. 212, 220, 46 L. Ed. 2d 450, 96 S. Ct. 498, (1976); *Commonwealth v. Moore,* 54 Mass. App. Ct. 334, 344 n.8, 765 N.E.2d 268 (2002) (intent of G. L. c. 269, § 10, is to protect public from potential danger incident to unlawful possession of such weapons). See also *General Elec. Co. v. Department of Envtl. Protection,* 429 Mass. 798, 805 n.8, 711 N.E.2d 589 (1999) (concluding that two statutes "are like statutes in that similar public policy considerations underlie both statutes"). Cf. *Commonwealth v. Alvarez,* 413 Mass. 224, 230 n.5, 596 N.E.2d 325 (1992) (suggesting that G. L. c. 94C, § 32J, is "like" Federal and other State school zone statutes). The Federal conviction properly served as a predicate offense in these circumstances.

c. Peremptory challenges to three of the four white females. During jury selection, codefendant Brown's attorney challenged three of the four white female jurors. See *Commonwealth v. Jordan,* 439 Mass. 47, 62, 785 N.E.2d 368 (2003) (concluding that art. 12 of Massachusetts Declaration of Rights proscribes use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in group delineated by race and gender). The defendant did not object, but the prosecutor did. The prosecutor asked the judge to find that Brown's attorney had engaged in a pattern of discriminatory strikes. The judge declined, stating, "I'm not going to [address the issue] at this time."

Now the defendant claims that the judge failed to follow the procedural requirements articulated in *Commonwealth v. Burnett,* 418 Mass. 769, 770-771, 642 N.E.2d 294 (1994). According to the defendant, the judge should have made an explicit finding regarding whether the required prima facie showing of impropriety had been

made. *Id.* at 771. Although the judge did not follow the procedure established by the Supreme Judicial Court, procedural error is not a per se ground for reversal. *Commonwealth v. Calderon,* 431 Mass. 21, 27, 725 N.E.2d 182 (2000). The defendant failed to object. If there was error, our review is limited to whether there exists a substantial risk of a miscarriage of justice.[6] *Commonwealth v. Randolph,* 438 Mass. 290, 294, 780 N.E.2d 58 (2002). We conclude that the judge's statement constituted an implicit finding that no discriminatory pattern of peremptory challenges had been demonstrated. If the judge's finding is supported by the record, we afford it substantial deference. *Commonwealth v. Cavotta,* 48 Mass. App. Ct. 636, 638, 724 N.E.2d 332 (2000).

There was no showing of gender-based strikes. After three women had been struck from the jury, two of the three women were replaced with women; therefore, the net effect was a reduction in the number of women on the jury by just one. See *Commonwealth v. Hyatt,* 409 Mass. 689, 692, 568 N.E.2d 1148 (1991) (where two white jurors were replaced with white jurors, there was no showing of race-based strikes); *Commonwealth v. LeClair,* 429 Mass. 313,

[6] We reject the defendant's attempt to derive a more favorable standard of review based on the Commonwealth's objection to the peremptory challenges. We also reject the defendant's attempt, based on the Commonwealth's unsuccessful objection at trial to Brown's exercise of her peremptory challenges, to preclude the Commonwealth from arguing on appeal that Brown's exercise of her peremptory challenges was proper. The defendant has not substantiated either argument with relevant authority. The defendant suggests that his counsel's failure to object constituted ineffective assistance of counsel. For purposes of this appeal, we equate the substantial risk standard and the ineffective assistance of counsel standard. *Commonwealth v. Randolph,* 438 Mass. 290, 297, 780 N.E.2d 58 (2002).



320-321, 708 N.E.2d 107 (1999) (judge acted within his discretion in finding no prima facie case of discriminatory challenges where replacement venire contained roughly equal numbers of men and women and prosecutor struck eight of eleven men and no women). In the present case, there were five women on the deliberating jury.

We are unable to discern from the record the race of the female jurors in the venire or on the deliberating jury. See *Commonwealth v. Arriaga,* 438 Mass. 556, 571-572, 781 N.E.2d 1253 (2003). In these circumstances, where the record is silent as to the racial composition of the venire and the jury, we cannot conclude that the defendant has met his burden of overcoming the presumption that the peremptory challenges were proper. See *Commonwealth v. Burnett,* 418 Mass. at 770 (presumption of correctness ordinarily attends exercise of peremptory challenges).

d. Prosecutorial misconduct. The defendant argues that errors made by the prosecutor established a pattern of intentional misconduct which infected the trial with prejudicial error. We have examined each claim and conclude that the allegations of prosecutorial misconduct are unwarranted.

i. The prosecutor's opening statement. Brown was tried with the defendant on charges of being an accessory after the fact. In his opening, the prosecutor explained to the jury the Commonwealth's theory of the case against both defendants. The prosecutor told the jury that the Commonwealth had to prove that Brown "did something to assist Mr. Smith in avoiding detection, capture, trial, or punishment. And in this case, it's the Commonwealth's allegation that she lied." The defendant moved for a mistrial, which was denied. The defendant argues that

because the judge allowed the defendant's motion to sever Brown's perjury charge, the prosecutor should not have been permitted to state in opening that it was the Commonwealth's position that Brown lied to the police.[7]

The statement was not improper. "Generally, a prosecutor in a criminal action may state anything in his opening argument that he expects to be able to prove by evidence." *Commonwealth v. Cohen,* 412 Mass. 375, 382, 589 N.E.2d 289 (1992). This general rule also permits the prosecutor to state those facts which would have to be proved by inferences. *Commonwealth v. Johnson,* 429 Mass. 745, 748, 711 N.E.2d 578 (1999). Whether Brown had lied was a central issue in the case, and relevant to the charge of accessory after the fact.

ii. Testimony of Detective Smith about the grand jury. During cross-examination, defense counsel elicited from Detective Smith that he had gone to 33 Lawn Street to serve grand jury subpoenas although he had not attempted to interview Patrick Veridieu or Elaine Shaw. During redirect examination, the prosecutor asked Detective Smith whether Veridieu and Shaw had testified before the grand jury. Detective Smith answered that they had.

The defendant objected, but the record does not establish the basis of the defendant's objection. An objection must be sufficient to make the grounds clear to the judge. See *Commonwealth v. Rivera,* 425 Mass. 633, 636, 682 N.E.2d 636 & nn. 1 & 2 (1997); *Commonwealth v. Houghtlin,* 16 Mass. App. Ct. 691, 695, 454 N.E.2d 1289 (1983). Our review is limited, if there is error, to whether

[7] Brown told the police that the defendant was outside the house in a car when Robinson was shot.



any error created a substantial risk of a miscarriage of justice.

The defendant argues that Detective Smith's testimony was hearsay because Detective Smith had no personal knowledge of whether either Veridieu or Shaw testified before the grand jury. The defendant further argues that such hearsay testimony impermissibly suggested that the prosecutor possessed information against the defendant which was not in evidence and that the erroneous admission of the testimony concerning Veridieu effectively left the defendant without a defense: that Veridieu was the shooter. See *Commonwealth v. Loguidice,* 420 Mass. 453, 455, 650 N.E.2d 1254 (1995).

The defendant's challenge on grounds that the testimony was "hearsay" is not persuasive. The defendant's point appears to be that since Detective Smith could not be present in the grand jury room when Veridieu and Shaw appeared, he could only know whether Shaw and Veridieu testified based on the statements of another. The Commonwealth was entitled to rebut the inference suggested by the defendant that the police investigation was inadequate or that they had not diligently pursued the investigation. See *Commonwealth v. Carrion,* 407 Mass. 263, 274-275, 552 N.E.2d 558 (1990). There was no error, but if there were it would not rise to the level of a substantial risk of a miscarriage of justice.

iii. References to the defendant's criminal history. The defendant claims that Detective Smith's reference to the defendant's photograph as being from a booking sheet and another witness's references to the defendant's photograph as a "mugshot" constituted prejudicial error and that the judge erred in not granting his motions for a

mistrial. Instead, on each occasion, the judge promptly instructed the jury to disregard the reference. We conclude that the witnesses' missteps did not require a mistrial and that the judge's instructions to the jury to disregard the references were sufficient in these circumstances.[8] See *Commonwealth v. Robertson,* 408 Mass. 747, 753, 563 N.E.2d 223 (1990); *Commonwealth v. Ellerbe,* 430 Mass. 769, 781, 723 N.E.2d 977 (2000); *Commonwealth v. Lanning,* 32 Mass. App. Ct. 279, 284, 589 N.E.2d 318 (1992). In addition, the judge twice instructed the jury to draw no inferences from the fact that the police had the defendant's photograph in their possession.

iv. Details about Robinson's injuries and recuperation and reference to his suffering. The defendant argues that introduction of evidence concerning the extent of Robinson's injuries and medical complications was substantially more unfairly prejudicial than probative and that the Commonwealth unnecessarily referred to Robinson's suffering in closing argument. The defendant objected to the admission of the medical testimony, so we review to determine whether any error was prejudicial. The defendant did not, however, object to the admission of the medical records or to the closing argument, so our review is limited to whether any error created a substantial risk of a miscarriage of justice.

The Commonwealth argues that the judge did not err in admitting such evidence because the evidence was (1)

[8] The jury were aware that the witnesses were not shown the photographs until several weeks after the defendant had been arrested for the crime. Therefore, the fact that the defendant had been through the booking process or that "mugshots" of the defendant existed would not prejudice the defendant.



probative of the defendant's intent to kill; (2) relevant because one of the defense theories was that Robinson had changed his story to conform to his injuries; and (3) relevant to establish Robinson's physical condition at the time he identified the defendant's photograph.

We agree that the testimony concerning the location of Robinson's wounds and the extensive organ damage he suffered was admissible because it was probative of the issue whether the assailant intended to kill Robinson. See *Commonwealth v. Gill,* 37 Mass. App. Ct. 457, 463-464, 640 N.E.2d 798 (1994). The testimony concerning the subsequent treatment and medical complications, including life-threatening infections, was not relevant on this point. It was, however, relevant as it bore on Robinson's ability to communicate with the police and identify the defendant while in the hospital.

The extensive and detailed medical testimony concerning Robinson's need for a liver transplant to avoid death from complications due to the destruction of his digestive system stretched the limits of relevance. Any error in its admission was not prejudicial, however, as it was cumulative of the other properly admitted evidence of Robinson's injuries and treatment, including Robinson's appearance before the jury. *Commonwealth v. Moreschi,* 38 Mass. App. Ct. 562, 566-567, 649 N.E.2d 1132 (1995).

The medical records were relevant because they assisted the jury in understanding the medical evidence. See *Commonwealth v. McDougal,* 2 Mass. App. Ct. 820, 821, 309 N.E.2d 891 (1974); *Commonwealth v. Gill,* 37 Mass. App. Ct. at 464.

The reference in closing argument to Robinson's suffering was but one sentence in an otherwise proper

argument. In the context of the entire argument, the defendant's concession that Robinson suffered egregiously, and the lack of an objection, the comment did not create a substantial risk of a miscarriage of justice. *Commonwealth v. Duguay,* 430 Mass. 397, 403-404, 720 N.E.2d 458 (1999).

e. Alleged Bruton violations. The defendant claims that his confrontation rights were abridged by the introduction of certain statements of Brown, in violation of *Bruton v. United States,* 391 U.S. 123, 137, 20 L. Ed. 2d 476, 88 S.Ct. 1620, (1968). "According to *Bruton,* severance is constitutionally required where: a codefendant's extrajudicial statements are offered in evidence at a joint trial; the statements are 'clearly inadmissible' as against the defendant; the codefendant does not testify; and finally, there is a substantial possibility that, in determining the defendant's guilt, the jury relied on the codefendant's 'powerfully incriminating extrajudicial statements' notwithstanding any limiting instructions from the judge." *Commonwealth v. Adams,* 416 Mass. 55, 58, 617 N.E.2d 594 (1993), quoting from *Commonwealth v. Pontes,* 402 Mass. 311, 314, 522 N.E.2d 931 (1988).

Here, the defendant does not argue that his trial should have been severed from Brown's trial; rather, he argues that certain statements should not have been admitted. This is a difficult argument for the defendant as he pursued a trial strategy which depended on Brown's statements. In fact, he moved to sever only the perjury charge and stated that "Felicia Brown is [the defendant's] best defense."[9] The defendant did not object to the admission

[9] For a discussion of some circumstances in which a defendant has waived his right to confront witnesses under the Sixth Amendment to the United States Constitution, see *United States v. Stephens,* 609 F.2d

(Continued on following page)



of most of the testimony concerning Brown's statements to Detective Smith or request a limiting instruction. "In reviewing the defendant's conviction, we will 'not disregard the theory of law on which the parties proceeded at trial.'" *Commonwealth v. Silva,* 431 Mass. 401, 405, 727 N.E.2d 1150 (2000), quoting from *Commonwealth v. Monteagudo,* 427 Mass. 484, 487, 693 N.E.2d 1381 (1998). Considering the defendant's trial strategy, the jury's consideration of the hearsay testimony[10] did not create a substantial risk of a miscarriage of justice.[11] *Commonwealth v. Silva,* 431 Mass. at 406.

In looking at each statement, we hold that no error occurred, although for varying reasons depending on the statement. See *Commonwealth v. Devlin,* 365 Mass. 149, 159, 310 N.E.2d 353 (1974) (statement admissible against defendant as statement of joint venturer); *Commonwealth v. Yesilciman,* 406 Mass. 736, 746, 550 N.E.2d 378 (1990) (remarks made during closing argument are viewed in context of entire argument and in light of judge's instructions to jury and evidence at trial); *Commonwealth v. Ivy,* 55 Mass. App. Ct. 851, 857-858, 774 N.E.2d 1100 (2002) (to

230, 232-233 (5th Cir.1980); *Brown v. Artuz,* 124 F.3d 73, 77 (2d Cir.1997), cert. denied, 522 U.S. 1128, 140 L.Ed.2d 135, 118 S.Ct. 1077 (1998); *United States v. Reveles,* 190 F.3d 678, 683 (5th Cir.1999); *United States v. Plitman,* 194 F.3d 59, 64 (2d Cir.1999).

[10] The alleged hearsay statements are Brown's statement to police that she was under pressure; the prosecutor's reference in closing argument to Brown's grand jury testimony; and two witnesses' testimony of Brown's statements to them.

[11] The standard of review is substantial risk of a miscarriage of justice because the defendant either did not object below to the testimony being admitted or, when an objection was raised, did not state any constitutional grounds. See *Commonwealth v. Fowler,* 431 Mass. 30, 41 n. 19, 725 N.E.2d 199 (2000).

exclude such probative statements under strictures of *confrontation clause of Sixth Amendment to United States Constitution* would be height of wrongheadedness, given that confrontation clause has as basic purpose promotion of integrity of fact-finding process). See also *Bruton v. United States,* 391 U.S. at 135 (statement not "powerfully incriminating extrajudicial statement[ ]").

f. Cumulative error. The defendant argues that the alleged errors created a "cumulative" effect requiring reversal. See *Commonwealth v. Smith,* 387 Mass. 900, 912, 444 N.E.2d 374 (1983). As we have concluded that the one error (in the admission of medical testimony regarding Robinson's need for a liver transplant) did not prejudice the defendant, we reject the defendant's claim.

Judgments affirmed.

Order denying motion for a new trial affirmed.

No. 03-8661

In The

# Supreme Court of the United States

MELVIN T. SMITH,

*Petitioner,*

v.

COMMONWEALTH OF MASSACHUSETTS,

*Respondent.*

**On Writ Of Certiorari To The Appeals Court Of The Commonwealth Of Massachusetts**

## BRIEF FOR PETITIONER

DAVID NATHANSON
COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 Bromfield Street
Boston, MA 02108
617-482-6212

*Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

At the close of the prosecution's case, the trial judge found that the prosecutor failed to provide even "a scintilla of evidence" on an essential element of the charged crime and issued a written order finding the defendant "not guilty." The question presented is whether the trial judge's decision to vacate that order at the close of the defendant's case on the remaining charges and submit the resurrected charge to the jury violated the Fifth Amendment prohibition against double jeopardy?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| STATEMENT OF JURISDICTION | 1 |
| CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED | 1 |
| STATEMENT OF THE CASE | 3 |
| A. Factual background | 3 |
| B. Facts relating to the double jeopardy violation | 6 |
| 1. Pre-acquittal proceedings | 6 |
| 2. Post acquittal proceedings | 9 |
| 3. Post-conviction proceedings | 13 |
| SUMMARY OF ARGUMENT | 14 |
| ARGUMENT | 16 |
| I. The trial judge unequivocally granted Smith's motion for acquittal at the close of the government's case on one of three charges. After Smith presented his defense and requested jury instructions on the remaining charges, the judge "reversed" her acquittal of Smith. But the Constitution grants Smith protection against being prosecuted for a crime where a competent tribunal previously acquitted him of that crime on the merits. Judgment must enter for Smith | 16 |




TABLE OF CONTENTS – Continued


| | Page |
|---|---|
| A. Jeopardy attached at the swearing-in of the jury | 16 |
| B. Jeopardy terminated when the judge unequivocally ordered Smith's acquittal orally, in writing, and in attested docket entries | 16 |
| 1. A judgment of acquittal terminates jeopardy | 16 |
| 2. The judge's acquittal of Smith represented a resolution of some or all of the factual elements of the offense | 18 |
| 3. The judge unequivocally acquitted Smith | 20 |
| C. The Double Jeopardy Clause barred further proceedings after the judgment of acquittal | 23 |
| D. Smith was unlawfully subjected to additional fact-finding proceedings on the firearm possession charge following his acquittal | 24 |
| E. The Massachusetts courts contravened this Court's settled precedent by requiring Smith to demonstrate prejudice from the violation of his right to be free from being placed twice in jeopardy | 32 |
| F. The policies embodied in the Double Jeopardy Clause favor the finality of a judgment of not guilty | 37 |
| CONCLUSION | 42 |

TABLE OF AUTHORITIES

Page

FEDERAL CASES

*Arizona v. Rumsey*, 467 U.S. 203 (1984) ..... *passim*

*Arizona v. Washington*, 434 U.S. 497 (1978) ..... 15, 33, 35

*Breed v. Jones*, 421 U.S. 519 (1975) ..... 27

*Brock v. North Carolina*, 344 U.S. 424 (1953) ..... 32, 38, 39, 42

*Bullington v. Missouri*, 451 U.S. 430 (1981) ..... 29, 30, 39, 40

*Burks v. United States*, 437 U.S. 1 (1978) ..... 24, 31, 32, 33

*Chapman v. California*, 395 U.S. 250 (1969) ..... 33

*Crist v. Bretz*, 437 U.S. 28 (1978) ..... 15, 16, 33, 42

*Cronic v. United States*, 466 U.S. 648 (1984) ..... 37

*Ex Parte Lange*, 85 U.S. 163 (1873) ..... 19

*Fong Foo v. United States*, 369 U.S. 141 (1962) ..... 18, 20, 24, 29, 38

*Green v. United States*, 355 U.S. 184 (1957) ..... 14, 16, 27, 37, 42

*Herring v. New York*, 422 U.S. 853 (1975) ..... 36

*Hudson v. Louisiana*, 450 U.S. 40 (1981) ..... 18, 24

*Illinois v. Somerville*, 410 U.S. 458 (1973) ..... 33

*In re Winship*, 397 U.S. 358 (1970) ..... 25

*Jackson v. Virginia*, 443 U.S. 307 (1979) ..... 37

*Justices of the Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984) ..... 15, 27

*Kepner v. United States*, 195 U.S. 100 (1904) ..... 20

*Lee v. United States*, 432 U.S. 23 (1977) ..... 17, 21



TABLE OF AUTHORITIES – Continued

Page

*Oregon v. Kennedy*, 456 U.S. 667 (1982) ..... 38

*Price v. Georgia*, 398 U.S. 323 (1970) ..... 27, 33

*Price v. Vincent*, 538 U.S. 634 (2003) ..... 22, 23, 28, 41

*Richardson v. United States*, 468 U.S. 317 (1984) ..... 18

*Ring v. Arizona*, 536 U.S. 584 (2002) ..... 29

*Rogers v. United States*, 422 U.S. 35 (1975) ..... 36

*Sanabria v. United States*, 437 U.S. 54 (1978) ..... *passim*

*Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003) ..... 19

*Serfass v. United States*, 420 U.S. 377 (1975) ..... 16, 24

*Smalis v. Pennsylvania*, 476 U.S. 140 (1986) ..... *passim*

*Swisher v. Brady*, 438 U.S. 204 (1978) ..... 15, 17, 25, 33, 35

*Tibbs v. Florida*, 457 U.S. 31 (1982) ..... 38

*United States v. Ball*, 163 U.S. 662 (1896) ..... 17, 20

*United States v. DiFrancesco*, 449 U.S. 117 (1980) ..... *passim*

*United States v. Finch*, 433 U.S. 676 (1977) ..... 29, 31, 32

*United States v. Jenkins*, 420 U.S. 358 (1975) ..... 25, 29, 30, 31

*United States v. Jorn*, 400 U.S. 470 (1971) ..... 21, 33, 38

*United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) ..... *passim*

*United States v. Parent*, 954 F.2d 23 (1st Cir. 1992) ..... 36

*United States v. Powell*, 469 U.S. 57 (1984) ..... 24

*United States v. Sanges*, 144 U.S. 310 (1892) ..... 19, 32

*United States v. Scott*, 437 U.S. 82 (1978) ..... *passim*

*United States v. Wilson*, 420 U.S. 332 (1975) ..... 28, 29, 31

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

*Commonwealth v. Jones*, 437 Mass. 1102, 772 N.E.2d 588 (2002) ..... 36

*Commonwealth v. Lowder*, 432 Mass. 92 (2000) ..... 17

*Commonwealth v. Merrill*, 80 Mass. (14 Gray) 415 (1860) ..... 17

*Commonwealth v. Moore*, 54 Mass. App. Ct. 334, 765 N.E.2d 268 ..... 36

*Commonwealth v. Smalis*, 480 A.2d 1046 (Pa. Super. Ct. 1984) ..... 26

*Commonwealth v. Smith*, 440 Mass. 1104, 797 N.E.2d 380 (2003) ..... 13

*Commonwealth v. Sperrazza*, 372 Mass. 667, 363 N.E.2d 673 (1977) ..... 9

*In re Speir*, 12 N.C. 491 (1828) ..... 42

FEDERAL STATUTES

28 U.S.C. § 1257(a) ..... 1

28 U.S.C. § 2254(d)(1) ..... 22

STATE STATUTES

M.G.L. c. 269, § 10 ..... 2, 12, 35

M.G.L. c. 140, § 121 ..... 2



TABLE OF AUTHORITIES – Continued

Page

FEDERAL RULES

Massachusetts Rule of Criminal Procedure 25 ..... 3, 6, 17, 18, 22

Massachusetts Rule of Criminal Procedure 30 ..... 13

OTHER AUTHORITIES

4 W. Blackstone, Commentaries on the Laws of England 329 (1769) ..... 14

http://www.supremecourtus.gov/oral_arguments/argument _transcripts/02-524.pdf at 25 (visited December 29, 2003) ..... 28, 41

Friedland, Double Jeopardy (1969) ..... 40

## OPINIONS BELOW

The order of the Massachusetts Superior Court granting Petitioner's motion for a required finding of "not guilty" of the offense charged and its subsequent order reconsidering and vacating the finding of "not guilty" are unpublished.[1] The opinion of the Superior Court denying Smith's motion for relief from unlawful restraint is unpublished.[2] The opinion of the Massachusetts Appeals Court affirming Smith's conviction is reported at 58 Mass. App. Ct. 166, 788 N.E.2d 977 (2003). The order of the Massachusetts Supreme Judicial Court denying further appellate review is reported at 440 Mass. 1104, 797 N.E.2d 380 (2003).

## STATEMENT OF JURISDICTION

The order of the Massachusetts Supreme Judicial Court denying further appellate review was issued on October 3, 2003. 440 Mass. 1104, 797 N.E.2d 380. The petition for writ of certiorari was filed on December 31, 2003. The petition was granted on June 14, 2004. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in part:

---

[1] J.A. 3, 21-22, 71-76; (Endorsed Motion for Required Finding of Not Guilty).

[2] J.A. 106-111.

"nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb. . . ."

2. Massachusetts General Laws, Chapter 269, § 10 provides, in part:

"(a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; . . .

. . . shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than one year nor more than two and one-half years in a jail or house of correction . . . ."

3. Massachusetts General Laws, Chapter 140, § 121 provides, in part:

"As used in sections 122 to 131P, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings:

* * *

'Firearm', a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than 16



inches or 18 inches in the case of a shotgun as originally manufactured."

4. Massachusetts Rule of Criminal Procedure 25 provides, in part:

**"Motion For Required Finding Of Not Guilty**

(a) Entry by Court. The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, it shall be ruled upon at that time. If the motion is denied or allowed only in part by the judge, the defendant may offer evidence in his defense without having reserved that right."

## STATEMENT OF THE CASE

### A. Factual background.

Below, Smith sets out the facts with an eye to the specific issues presented on certiorari. (The factual background is set out more fully in the opinion of the Massachusetts Appeals Court.)[3]

The Commonwealth of Massachusetts brought indictments against Petitioner Melvin Smith for unlawful

[3] J.A. 121-123.

possession of a firearm (fourth offense), assault and battery with a dangerous weapon, and armed assault with intent to murder.[4] Tracking Massachusetts law, the firearm indictment charged that Smith "did unlawfully, knowingly have in his possession, a firearm, to wit: a handgun, from which a bullet could be discharged, *the length of the barrel of said firearm being less than sixteen inches*".[5] Codefendant Felicia Brown was charged as an accessory after the fact.[6]

The case proceeded to trial, the jury was sworn, and the Commonwealth put on its case. The government presented evidence tending to show that on August 16, 1996, Christopher Robinson was shot three times and seriously injured.[7] The shooting was alleged to have taken place at 33 Lawn Street in Boston, the home of Robinson's aunt Patricia Brown and his cousin Felicia Brown.[8]

Melvin Smith stayed at 33 Lawn Street during the week prior to the shooting.[9] Smith and Robinson saw each other at 33 Lawn Street several times during that week.[10] Most of the time, Smith "basically" just stayed in Felicia's room.[11] According to Robinson, Smith was

[4] J.A. 121.

[5] J.A. 9 (emphasis added).

[6] J.A. 121.

[7] J.A. 12-13, 122.

[8] (Tr. 2:64-69); Portions of the trial transcript not included in the Joint Appendix will be cited, by volume and page, as "(Tr. [volume]:[page])."

[9] (Tr. 3:42).

[10] J.A. 16.

[11] (Tr. 3:56).



Felicia's boyfriend.[12] Prior to that evening, Smith had brought Heineken beer to 33 Lawn Street for Robinson to share and, at least once, gave Robinson a ride to the grocery store.[13]

Robinson testified that, on the night of the shooting, he descended from the third to the second floor.[14] As he reached the second floor, he saw Melvin Smith, gun in hand, standing in Felicia's room at the foot of her bed.[15] Robinson described the gun in question as a "pistol. It appeared to be a .32 or a .38."[16] Robinson believed the weapon involved was a .32 or .38 revolver based on his familiarity with handguns; his father owned "several" handguns.[17] Robinson testified that Smith shot him three times and that Smith and Brown then left the house.[18] At the time of the shooting, Robinson's blood alcohol level was at least .252,[19] Robinson having consumed vodka and beer nearly all day.[20] He also ingested marijuana and crack cocaine earlier that evening.[21]

At trial, the principal theory of the defense was that Robinson was too intoxicated to identify his assailant correctly and that one of the tenants in the house, Patrick

[12] (Tr. 3:54).

[13] (Tr. 3:33-34).

[14] J.A. 11.

[15] J.A. 11; (Tr. 2:70).

[16] J.A. 12.

[17] J.A. 13-14.

[18] J.A. 12-13.

[19] (Tr. 2:35); (Tr. 6:41).

[20] (Tr. 2:57, 58, 61, 117, 161, 173); (Tr. 3:49).

[21] (Tr. 2:117, 137); (Tr. 6:49, 53).

Verdieu, had both a motive and an opportunity to shoot him.[22]

**B. Facts relating to the double jeopardy violation.**

**1. Pre-acquittal proceedings.**

On November 12, 1998, the sixth day of trial, the Commonwealth closed its case.[23] After the Commonwealth rested, Smith moved for a "required finding of not guilty" on the charge of unlawful possession of a firearm[24] pursuant to Massachusetts Rule of Criminal Procedure 25.[25] The motion noted that the Commonwealth had "not presented any evidence that the barrel of the firearm used in this case was less than sixteen inches, a necessary element of the crime."[26]

The trial judge agreed that there was "not a scintilla of evidence on" the length of the barrel and granted the motion.[27] The following colloquy preceded the court's entry of its order finding Smith not guilty:

THE COURT: Do you rest?

MR. PULEO [THE PROSECUTOR]: Yes.

* * *

THE COURT: Do you people have, now that Mr. Puleo has finished with all his evidence and now

[22] J.A. 28-31, 38-40, 123.

[23] J.A. 19, 122.

[24] J.A. 22.

[25] J.A. 123.

[26] J.A. 98.

[27] J.A. 3, 21, 22.



he's rested, and we'll do it formally in front of the jury, but do you people have anything that –

MR. CARROLL [SMITH'S COUNSEL]: I do. I'd like to bring it up.

* * *

THE COURT: Mr. Puleo, with respect to Mr. Smith's motion for a required finding of not guilty on the firearm charge, possession of a firearm, do you wish to address that? . . . [P]art one deals with the portion of the statute wherein you have to prove the length of the barrel.

MR. PULEO: I think Mr. Robinson's testimony about the description of the gun was, variously, a handgun or a pistol. Mr. Robinson testified that he was familiar with guns because of his father's experience – I don't know if it was in the military, or what it was. And while Mr. Robinson was not asked a direct question about the length of the barrel, I think that those terms as used by Mr. Robinson, given his level of familiarity, if not quasi-expertise of handgun and pistol, satisfy –

THE COURT: Well, it's the jury that has to make the finding of fact that you've established that, not based upon what Mr. Robinson says is a pistol or a handgun. I mean, the jury has to make a finding.

MR. PULEO: And I think this jury, viewing this evidence in the light most favorable to the Commonwealth, would be warranted in finding that the –

THE COURT: *How can they find the length of the barrel? . . . There's not a scintilla of evidence on that.*

MR. PULEO: Because Mr. Robinson's testimony that it was a pistol, I think he even said a small pistol, or a handgun, allows for a reasonable inference that the barrel of a pistol or a handgun is not longer than [sixteen] inches.

* * *

THE COURT: No, I don't think that there is a basis in which a jury, based upon Mr. Robinson's testimony alone, can conclude that a pistol or a revolver has a barrel length of sixteen inches or less.

MR. PULEO: Well, given that, if that's the Court's interpretation of Mr. Robinson's testimony, then *I will be requesting to reopen and allow Mr. Robinson to testify to that.*

THE COURT: Well, this is the time in which they are moving for a required finding of not guilty. *I'm going to allow it on the firearm charge.*

MR. CARROLL: Your Honor, as to the other two charges, I would argue –

THE COURT: I'm going to deny it with respect to the other two. And I'm going to deny Ms. Brown's with respect to an accessory.

(End of side-bar conference.)

THE COURT: Mr. Puleo, any further evidence from the Commonwealth?

MR. PULEO: No. At this point, the Commonwealth rests their case.[28]

[28] J.A. 18-22 (emphasis added).



The trial judge then entered a written order on Petitioner's motion for a finding of not guilty as follows: "11/12/98 – Filed and after hearing, Allowed. Donovan, J. Attest: Marybeth Brady Assistant Clerk."[29] In addition, the court's order finding Smith not guilty on the firearm possession count was entered on the official docket, which reflected "11/12/98 Motion [for a required finding of not guilty] allowed after hearing."[30]

**2. Post acquittal proceedings.**

With the firearm charge out of the case, Smith and codefendant Felicia Brown presented their respective cases through the testimony of Patricia Brown, rested, moved for required findings of not guilty on the remaining charges, and then argued their requests for jury instructions on the remaining charges.[31] Following the conference on jury instructions, the judge announced that there would be a "15-minute recess now then we'll have final arguments."[32] But when counsel returned to the courtroom to make Smith's closing argument, the landscape dramatically changed. The judge announced, during the recess, that she had reviewed a then twenty-one-year-old case from the Massachusetts Supreme Judicial Court newly provided to her by the prosecutor.[33] Based on that case, the judge now took the view that the jury could "infer the

[29] (Endorsed Motion for Required Finding of Not Guilty).

[30] J.A. 3.

[31] J.A. 22-71.

[32] J.A. 71.

[33] J.A. 71 (*citing Commonwealth v. Sperrazza*, 372 Mass. 667, 363 N.E.2d 673 (1977)).

length of [the barrel of the gun] based on the type of instrument" it was.[34] After another colloquy between the judge and defense counsel regarding the sufficiency of the evidence, the prosecutor proposed the following:

> MR. PULEO: . . . *What I would request, though, rather than research on what I think is a legitimate question, at least to these three, though they have differing ideas of what the controlling law was, if the Court allows me to take the count to the jury and then certainly if the jury comes back not guilty, it's moot.* But if they do come back guilty and the Court is of the mind that that charge should not have gone to the jury, under Rule 25, of course, the Court still –
>
> THE COURT: Uh-huh. I can always set it aside.
>
> * * *
>
> THE COURT: I think that's the way we'll do it. Let it go to the jury.[35]

But defense counsel protested that he had additional arguments to make:

> MR. CARROLL: On my motion for a required finding on the handgun, in addition to the barrel length –
>
> THE COURT: Yes, *I'm reversing that.*
>
> MR. CARROLL: *In addition to arguing the length, there were other grounds within the motion asking the Court to direct that particular*

[34] J.A. 72.

[35] J.A. 74 (emphasis added).



> *finding be not guilty. I would like to argue those issues and –*
>
> THE COURT: *No. I'm going to deny it at this point*, your motion for a required finding of not guilty on the gun charge.
>
> MR. CARROLL: *Well, I just want to make sure the Court, and that it's on the record, that part of the motion is that –*
>
> THE COURT: *The motion has already been ruled on in this case.*
>
> MR. CARROLL: – the only evidence as to where Mr. Smith was staying at the time of the shooting is the statement of Christopher Robinson that Mr. Smith was, in fact, staying at – had been staying at their – at 33 Lawn Street for the same amount [of] time that Mr. Robinson had, for a week preceding the shooting.
>
> THE COURT: I understand.
>
> MR. CARROLL: That's the residence –
>
> THE COURT: I understand, and I'm denying it.
>
> MR. CARROLL: And also, I've also argued by analogy the Castle statute, that he's there as a legitimate guest, at worst.
>
> THE COURT: Yes, Thank you.[36]

Thus rebuffed in his attempts to fully address the issue of sufficiency of the evidence as to the firearm charge, the case proceeded on to closing arguments and instructions to

[36] J.A. 75-76 (emphasis added).

the jury.[37] While the jury deliberated, the parties continued to argue the question of sufficiency as to the firearm charge and the court took the issue under advisement.[38] At the close of jury deliberations, Smith was convicted of unlawful possession of a firearm, assault and battery with a dangerous weapon and armed assault with intent to murder.[39] (The jury acquitted Brown.)[40]

Immediately following the jury's verdict, the court proceeded to a jury-waived trial on that portion of the firearm indictment that charged Smith with a fourth offense (carrying an enhanced mandatory minimum sentence, restrictions on parole eligibility, and restrictions on deductions from the sentence for good conduct.)[41] Smith renewed his motion for required finding of not guilty at the close of the government's evidence on the subsequent offender portion of the trial.[42] The trial judge denied the motion, Smith rested, and the judge convicted Smith of a fourth offense of unlawful possession of a firearm.[43] Smith was then sentenced to concurrent terms of ten to twelve years on the firearm charge, nine to ten years on the assault and battery by means of a dangerous weapon charge, and twelve to fifteen years on the assault with intent to murder charge.[44] Smith appealed.

[37] J.A. 76-77.

[38] J.A. 80-90.

[39] J.A. 93-95.

[40] J.A. 95.

[41] (Tr. 8:17, 19-24).

[42] (Tr. 8:78-79).

[43] J.A. 96; M.G.L. c. 269, § 10(d).

[44] J.A. 96-97.



**3. Post-conviction proceedings.**

With his direct appeal pending in the Massachusetts Appeals Court, Smith filed a "Motion for Relief from Unlawful Restraint"[45] in the trial court seeking to set aside his firearm conviction on double jeopardy grounds.[46] Although the trial judge denied the motion, she acknowledged that "the court allowed Smith's motion for a required finding of not guilty on the firearm charge" and only withdrew the allowance *after* Smith rested his case.[47] But in the trial judge's view, the withdrawal of the finding of not guilty did not violate the Double Jeopardy Clause because "Smith was convicted by the same jury that first heard the evidence against him, and no second jury was needed."[48]

Smith appealed.[49] But, like the trial judge, the Massachusetts Appeals Court held that "double jeopardy protections were not violated in these circumstances because the judge's correction of her ruling did not require a second proceeding."[50]

He then sought review before the Massachusetts Supreme Judicial Court, which declined further review.[51] On June 14, 2004, this Court granted Petitioner's petition for a writ of certiorari.

[45] Mass. R. Crim. P. 30(a).

[46] J.A. 107-108.

[47] J.A. 107.

[48] J.A. 110-111.

[49] J.A. 121.

[50] J.A. 125.

[51] *Commonwealth v. Smith*, 440 Mass. 1104, 797 N.E.2d 380 (2003).

## SUMMARY OF ARGUMENT

The prohibition against further prosecution after acquittal constitutes the primary and most cherished protection contained in the Double Jeopardy Clause.[52] Here, the trial judge acquitted Smith of illegally possessing a firearm, finding that government presented "not a scintilla" of evidence on an essential element of the charge against him. She unequivocally entered a judgment – reflected in a signed order and entered on the official docket – of "not guilty." But after Smith presented his case and argued his requests for jury instructions on the remaining charges, the prosecutor convinced the judge to "reverse" Smith's acquittal on the firearm charge. Thus, the judge allowed the prosecutor to see if he could do better a second time in convincing a second factfinder, the jury, of Smith's guilt.

The Double Jeopardy Clause barred the judge's "reversal" of Smith's acquittal. The government violates the Double Jeopardy Clause when jeopardy has attached, the defendant is acquitted, and the government then subjects that defendant to "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the facts charged."[53] Where the first factual resolution of the case results in acquittal, jeopardy conclusively terminates and the Double Jeopardy Clause bars further proceedings.

[52] *Green v. United States*, 355 U.S. 184, 200 (1957); 4 W. Blackstone, Commentaries on the Laws of England 329, 355 (1769).

[53] *Smalis v. Pennsylvania*, 476 U.S. 140, 146 (1986) (*quoting United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977)).



Here, the prosecution against Smith satisfied each of these clear guideposts and, as such, violated the Double Jeopardy Clause. First, jeopardy attached when the jury was empanelled and sworn.[54] Second, jeopardy terminated when the court entered an order finding Smith "not guilty" of the crime with which he was charged; as this Court observed in *Smalis v. Pennsylvania*, "[a]cquittals . . . terminate the initial jeopardy."[55] Third, withdrawal of Smith's acquittal and submission of the resurrected charge to the jury indisputably subjected Smith to "further proceedings . . . devoted to the resolution of factual issues."[56]

Finally, the lower courts contravened this Court's settled precedent by considering whether the double jeopardy violation prejudiced Smith. This Court has repeatedly held that the Constitution "*conclusively presumes*" unfairness when the government places a defendant twice in jeopardy.[57]

[54] *Crist v. Bretz*, 437 U.S. 28, 37-38 (1978).

[55] *Smalis*, 476 U.S. at 145 (*quoting Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 308 (1984)).

[56] *Martin Linen*, 430 U.S. at 570.

[57] *Swisher v. Brady*, 438 U.S. 204, 214 (1978) (emphasis added, *quoting Arizona v. Washington*, 434 U.S. 497, 503-505 (1978)); *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980).

## ARGUMENT

### I. The trial judge unequivocally granted Smith's motion for acquittal at the close of the government's case on one of three charges. After Smith presented his defense and requested jury instructions on the remaining charges, the judge "reversed" her acquittal of Smith. But the Constitution grants Smith protection against being prosecuted for a crime where a competent tribunal previously acquitted him of that crime on the merits. Judgment must enter for Smith.

#### A. Jeopardy attached at the swearing-in of the jury.

This Court has established jeopardy attaches in a jury trial when the jury is empanelled and sworn.[58] Here, the jury was sworn on November 4, 1998.[59] Smith then participated in six days of trial before the jury, while the prosecutor put on the entire government case and then rested.[60] Plainly, the trial subjected Smith "to the hazards of trial and possible conviction."[61] Accordingly, jeopardy attached.

---

[58] *Bretz*, 437 U.S. at 37-38.

[59] J.A. 2.

[60] J.A. 19, 22.

[61] *Serfass v. United States*, 420 U.S. 377, 391 (1975) (*quoting Green*, 355 U.S. at 187).



#### B. Jeopardy terminated when the judge unequivocally ordered Smith's acquittal orally, in writing, and in attested docket entries.

##### 1. A judgment of acquittal terminates jeopardy.

The Double Jeopardy Clause bars the continuation of proceedings following the termination of jeopardy. Jeopardy terminates in an "acquittal," defined broadly as any "ruling" by a trial court that "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[62] This principle is not one of recent invention. The Court has consistently reaffirmed it in an unbroken line of cases stretching back more than a century, such that the absolute finality accorded to an acquittal by the Double Jeopardy Clause has become "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence."[63]

The trial judge's allowance of Smith's motion for a required finding of not guilty represented a final acquittal that terminated jeopardy as to the firearm charge. The trial judge both possessed and exercised the power to acquit Smith given to her by both Massachusetts common law[64] and Rule 25(a) of the Massachusetts Rules of Criminal Procedure. That rule provides:

---

[62] *Lee v. United States*, 432 U.S. 23, 30 n.8 (1977) (*quoting Martin Linen*, 430 U.S. at 571).

[63] *Martin Linen*, 430 U.S. at 571 (*quoting United States v. Ball*, 163 U.S. 662, 671 (1896)).

[64] *Commonwealth v. Merrill*, 80 Mass. (14 Gray) 415, 418 (1860); *Commonwealth v. Lowder*, 432 Mass. 92, 96-97 (2000); *contrast Brady*, 438 U.S. at 216.

> The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, it shall be ruled upon at that time.

By using the imperative "shall", Rule 25 gives the trial judge not only the power to acquit but also the *duty* to acquit where the government's evidence is insufficient.[65]

All of the Massachusetts courts agreed that the judge allowed Smith's Rule 25 motion for a required finding of not guilty at the close of the government's case.[66] But none of the Massachusetts courts acknowledged that jeopardy terminated upon that acquittal.[67] This Court's jurisprudence, however, is consistent and clear: jeopardy terminates upon an order of acquittal based upon the insufficiency of the evidence.[68]

[65] *See* Mass. R. Crim. P. 25(a) (reporters notes).

[66] J.A. 107, 123.

[67] J.A. 107-111, 124-125.

[68] *Martin Linen*, 430 U.S. at 572; *Smalis*, 476 U.S. at 144; *Richardson v. United States*, 468 U.S. 317, 325 n.5 (1984); *Hudson v. Louisiana*, 450 U.S. 40, 44-45 n.5 (1981); *United States v. Scott*, 437 U.S. 82, 91 (1978); *Sanabria v. United States*, 437 U.S. 54, 64 & n.18 (1978); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962).



**2. The judge's acquittal of Smith represented a resolution of some or all of the factual elements of the offense.**

The trial judge's order acquitting Smith "whatever its label, actually represents a resolution, *correct or not*, of some or all of the factual elements of the offense."[69] *Sanabria v. United States*, *United States v. Scott* and *Smalis v. Pennsylvania* all hold that an acquittal based on evidentiary insufficiency represents a resolution of the factual elements of the offense,[70] in contradistinction to a dismissal on mere procedural grounds.[71] Here, Smith repeatedly insisted on his right to submit the factual elements of the offense to the trial judge for such a resolution.[72] In response, the judge determined that government presented "not a scintilla of evidence" as to barrel length, an essential element of the crime.[73]

The Massachusetts Appeals Court proclaimed that the judge should be able to "correct" her resolution of the elements of the offense.[74] But it matters not whether a judgment of acquittal is based on a legal error: the acquittal is still final and preclusive.[75] For example, the trial

[69] *Martin Linen*, 430 U.S. at 571 (emphasis added).

[70] *Sanabria*, 437 U.S. at 77; *Scott*, 437 U.S. at 97; *Smalis*, 476 U.S. at 144.

[71] *Scott*, 437 U.S. at 92.

[72] *Scott*, 437 U.S. at 96, 101; *contrast Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003).

[73] J.A. 21.

[74] J.A. 125-26.

[75] *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984); *Ex Parte Lange*, 85 U.S. 163, 174 (1873); *Sanabria*, 437 U.S. at 68-69 & n.22, 75; *Scott*, 437 U.S. at 98; *Smalis*, 476 U.S. at 144 n.7; *United States v. Sanges*, 144

(Continued on following page)

judge in *Sanabria* acquitted the defendant of participating in an illegal gambling business based solely on a legally erroneous defense-requested exclusion of the government's evidence.[76] Nevertheless, this Court concluded that the Double Jeopardy Clause prohibited revisiting the judgment of acquittal because it was "final and nonreviewable."[77] And in *Fong Foo v. United States*, the trial judge entered a judgment of acquittal "based upon an egregiously erroneous foundation."[78] Nevertheless, this Court held that " 'the verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy, and thereby violating the Constitution.' "[79] Thus, the trial judge's ruling, correct or not, constitutes a resolution of the elements of the offense and, as such, is protected as a final and preclusive acquittal by the Double Jeopardy Clause.

### 3. The judge unequivocally acquitted Smith.

The trial judge's ruling in Smith's case stands as a model of finality. After conducting a careful colloquy with the prosecutor regarding the sufficiency of the evidence, the judge responded to the prosecutor's arguments by saying,

> THE COURT: No, I don't think that there is a basis in which a jury, based upon Mr. Robinson's testimony alone, can conclude that a pistol or a revolver has a barrel length of sixteen inches or less.
>
> MR. PULEO: Well, given that, if that's the Court's interpretation of Mr. Robinson's testimony, then I will be requesting to reopen and allow Mr. Robinson to testify to that.
>
> THE COURT: Well, this is the time in which they are moving for a required finding of not guilty. *I'm going to allow it on the firearm charge.*[80]

Having no further evidence, the prosecutor then rested his case.[81] Leaving no room for doubt, the trial judge then took all of the necessary steps to convert her oral ruling into a final order. She first codified that ruling by making an endorsement – "11/12/98 – Filed and after hearing, Allowed. Donovan, J. Attest: Marybeth Brady Assistant Clerk" – on the motion itself.[82] This ruling was then entered on the official docket, which reflects the notation "11/12/98 Motion [for a required finding of not guilty] allowed after hearing."[83]

The order of acquittal might not have been final if it contemplated further argument.[84] But here, the judge demonstrably viewed her order of acquittal on the firearm charge as final. Witness her immediate rejection of the prosecutor's motion to reopen and her initiation of further

---

U.S. 310, 318 (1892); *United States v. Ball*, 163 U.S. 662, 669-670 (1896); *Kepner v. United States*, 195 U.S. 100, 126-130 (1904).

[76] *Sanabria*, 437 U.S. at 68-69.

[77] *Sanabria*, 437 U.S. at 77-78.

[78] *Fong Foo*, 369 U.S. at 143.

[79] *Fong Foo*, 369 U.S. at 143 (*quoting Ball*, 163 U.S. at 671).

[80] J.A. 21-22 (emphasis added).

[81] J.A. 22.

[82] (Endorsed Motion for Required Finding of Not Guilty); J.A. 98.

[83] J.A. 3.

[84] *See United States v. Jorn*, 400 U.S. 470, 478 n.7 (1971); *see also Lee*, 432 U.S. at 30.

proceedings on the remaining charges by requesting the defense to proceed with its case.[85] Indeed, the very structure of Rule 25 required this definitive ruling because it prohibits the trial judge from reserving a ruling on the motion.[86] The rule expressly states that if the motion is made at the close of the prosecution's case, "it shall be ruled upon at that time."[87] Therefore, both Smith and the government had every reason to expect that this acquittal stood as the final resolution of the firearm charge.[88]

This case thus stands in stark contrast to *Price v. Vincent*.[89] In *Vincent*, the trial judge voiced his "impression" that the lesser offense of second-degree murder was more "appropriate."[90] Moreover, the judge almost immediately agreed to hear further argument, suggesting that his ruling was not final.[91] Thus, this Court held that, for purposes of 28 U.S.C. § 2254(d)(1), it was not objectively unreasonable for the Michigan Supreme Court to decide that these comments were not sufficiently final to terminate jeopardy.[92]

In contrast, the trial judge's actions here bear all the indicia of "finality and clarity" that the *Vincent* Court noted were absent in *Vincent* and present in *Smalis* and

[85] J.A. 22.

[86] Mass. R. Crim. P. 25(a).

[87] Mass. R. Crim. P. 25(a).

[88] *DiFrancesco*, 449 U.S. at 136, 139.

[89] *Price v. Vincent*, 538 U.S. 634 (2003).

[90] *Vincent*, 538 U.S. at 637.

[91] *Vincent*, 538 U.S. at 637.

[92] *Vincent*, 538 U.S. at 643.



*United States v. Martin Linen*.[93] The final and clear action in *Smalis* was merely the trial judge's ruling that "'the court was not satisfied . . . that there was sufficient evidence.'"[94] And in *Martin Linen*,

> [a]fter dismissal of the [deadlocked] jury, the District Judge advised counsel for all parties that he would be inclined "to enter a judgment of acquittal as to [the defendants] if an appropriate motion was made." He said that he had "almost instructed a verdict for all Defendants" because the Government's case "is without a doubt the weakest [contempt case that] I've ever seen."[95]

As in *Smalis* and *Martin Linen*, the trial judge here applied the appropriate standard, definitively ruled that the evidence was insufficient, and reduced the judgment of acquittal to a written order. Thus, the trial judge unequivocally acquitted Smith.

### C. The Double Jeopardy Clause barred further proceedings after the judgment of acquittal.

Once the judge declared Smith to be not guilty of the firearm charge, jeopardy terminated and further proceedings on that charge violated the prohibition against double jeopardy.[96] Once jeopardy attaches, "there can be no appeal

[93] *Vincent*, 538 U.S. at 640 (citing *Smalis*, 476 U.S. at 142; *Martin Linen*, 430 U.S. at 566).

[94] *Smalis*, 476 U.S. at 141-42 (*quoting* appendix to certiorari petition).

[95] *Martin Linen*, 430 U.S. at 566 n.3.

[96] *Smalis*, 476 U.S. at 145.

from, *or further prosecution after*, an acquittal."[97] This prohibition is not restricted to second trials. The Constitution protects acquitted defendants "not only when it might result in a second trial, *but also if reversal would translate into further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.*"[98] This is so whether the acquittal is by the court or by a jury: in either case, jeopardy irrevocably terminates.[99]

### D. Smith was unlawfully subjected to additional factfinding proceedings on the firearm possession charge following his acquittal.

The further proceedings in Smith's case violated this Court's explicit and readily understandable standards recited above. The judge unequivocally found Smith to be not guilty.[100] Believing that the firearm charge was no longer before the court, Smith presented his case on the remaining charges through cross-examination of Patricia Brown, the mother of his co-defendant.[101] He then rested his case and argued his requests for jury instructions. Only after all this did the

[97] *Serfass*, 420 U.S. at 392 (emphasis added, internal quotation marks omitted); *see also Burks v. United States*, 437 U.S. 1, 17 (1978); *see also United States v. Powell*, 469 U.S. 57, 65 (1984).

[98] *Smalis*, 476 U.S. at 146 (emphasis added, *quoting Martin Linen*, 430 U.S. at 570).

[99] *Fong Foo*, 369 U.S. at 143; *Martin Linen*, 430 U.S. at 573; *Sanabria*, 437 U.S. at 64 n.18; *Hudson*, 450 U.S. at 44-45, n.5; *Rumsey*, 467 U.S. at 210-212; *Smalis*, 476 U.S. at 145.

[100] J.A. 3, 21-22.

[101] J.A. 38-42, 56-59; J.A. 22.



judge "reverse" the already-granted acquittal. Immediately following that reversal, the jury proceeded to consider the facts on each element of the resurrected offense[102] and returned its specific finding of guilt.[103] These are additional "proceedings going to guilt or innocence."[104]

But this Court held in *United States v. Jenkins* and *Swisher v. Brady* that the Double Jeopardy Clause bars the making of supplemental findings following a true acquittal.[105] That is what happened in Smith's case. After the acquittal, the jury continued on to consider the defendant's case and factually determine whether they believed that the Commonwealth proved each element of the firearm charge beyond a reasonable doubt.[106] Under any reasonable definition of the phrase, the jury's deliberations constituted further factfinding proceedings going to guilt or innocence, barred by the prohibition against double jeopardy.

In order to distinguish this case from *Smalis* and *Martin Linen*, the government and the Massachusetts Appeals Court cling to the theory that no double jeopardy violation occurred in Smith's case because "the judge's correction of her ruling did not require a *second proceeding*" before a second trier of fact.[107] This is legal sleight-of-hand. *Smalis* established that the Double Jeopardy Clause

[102] J.A. 77-79.

[103] J.A. 94-95; J.A. 102 (verdict slip).

[104] *Smalis*, 476 U.S. at 145.

[105] *United States v. Jenkins*, 420 U.S. 358, 370 (1975), overruled on other grounds, *Scott*, 437 U.S. at 86-87; *Brady*, 438 U.S. at 218.

[106] *In re Winship*, 397 U.S. 358, 361 (1970).

[107] J.A. 125 (emphasis added).

prohibits "subjecting the defendant to *post acquittal fact-finding proceedings* going to guilt or innocence" regardless of whether those proceedings literally constitute a second trial.[108] The Massachusetts Appeals Court avoided this edict by substituting the phrase "second proceeding" for "post acquittal factfinding proceedings" – a significant difference.

Contrary to the position of the Massachusetts Appeals Court, the scope of the protection against double jeopardy does not turn on the fortuity of how many counts a defendant faces. The status of jeopardy is determined offense by offense; if a defendant is acquitted of one charge, jeopardy terminates on that charge even if it continues for other charges in the trial or indictment. Adoption of the Massachusetts Appeals Court's standard would require this Court to overrule *Smalis v. Pennsylvania*. In *Smalis*,[109] the defendants were charged with seven offenses. The trial court acquitted the defendants on three counts at the close of the prosecution's case for insufficient evidence, with trial to continue on the remaining four.[110] The prosecution attempted to take a mid-trial appeal of the three acquittals, which this Court unanimously rejected. The Court held that "the trial judge's granting of petitioners' demurrer was an acquittal" terminating jeopardy on the three charges, and this acquittal could not be reversed because "reversal would have led to further trial proceedings" on those charges.[111] Even though reversal would have resulted

[106] *Smalis*, 476 U.S. at 145 (emphasis added).

[109] *Smalis v. Pennsylvania*, 476 U.S. 140 (1986).

[110] *Commonwealth v. Smalis*, 480 A.2d 1046, 1048 & n.1 (Pa. Super. Ct. 1984).

[111] *Smalis*, 476 U.S. at 146.



in resumption of the *same* trial before the *same* finder of fact,[112] this Court nonetheless held that the resumption of proceedings after the trial judge's acquittal would violate the Double Jeopardy Clause.[113]

At the moment the trial judge was considering whether to reverse Smith's acquittal on the firearm possession charge, it stood in exactly the same position as the appellate courts in *Smalis*. While here it was a trial court rather than appellate court that contemplated reversing the acquittal, nothing turns on that distinction: the double jeopardy problem in *Smalis* was that proceedings on the acquitted charges would resume where they left off,[114] regardless of who was responsible for the resumption.

*Smalis* represents an unexceptional and direct extension of this Court's decision thirty years earlier in *Green v. United States*.[115] There, the Court expressly rejected the idea that "jeopardy on [the acquitted] charge continued until every offense alleged in the indictment had been finally adjudicated." This Court's opinion in *Price v. Georgia* reaffirms *Green* and leaves no room for mistake: jeopardy does not "continue" for acquitted offenses merely because proceedings continue on other offenses.[116] Rather, "a verdict of acquittal is final, ending a defendant's jeopardy."[117] Thus,

[112] *Smalis*, 476 U.S. at 145.

[113] *Smalis*, 476 U.S. at 145.

[114] *Smalis*, 476 U.S. at 145-46.

[115] *Green v. United States*, 355 U.S. 184 (1957).

[116] *Price v. Georgia*, 398 U.S. 323, 329 (1970); *see Justices of the Boston Municipal Court v. Lydon*, 466 U.S. 294, 312 (1984); *cf. Breed v. Jones*, 421 U.S. 519, 534 (1975); *cf. Rumsey*, 467 U.S. at 210.

[117] *Green*, 355 U.S. at 188.

the trial judge's decision to send the firearm charge to the jury after acquittal placed Smith in jeopardy on that count a second time and thus violated the Double Jeopardy Clause.

The Massachusetts Appeals Court[118] and the United States in *Vincent* went wrong by mangling this Court's inapposite decision in *United States v. Wilson*.[119] *Wilson* holds that the Double Jeopardy Clause is not violated by a government appeal after a jury convicts the defendant but the judge *later* orders an acquittal because all that was required to correct the error was reinstatement of the verdict.[120] The key to *Wilson* was that no further factfinding proceedings ensued.[121]

By contrast, under the Appeals Court's newly-invented rubric, the judge's finding of not guilty meant nothing for purposes of double jeopardy because, by a mere fortuity, the jury remained to engage in factfinding on the *other* non-acquitted offenses. When this view was advanced by the United States as *amicus curiae* in *Vincent*, at least one Justice of this Court characterized the argument as "extraordinary."[122] Indeed, the ensuing opinion in *Vincent* does not cite *Wilson* at all. That is because *Wilson* simply does not apply. Where, as here, the *first* factual resolution of the case resulted in acquittal, then jeopardy

[118] J.A. 125.

[119] *United States v. Wilson*, 420 U.S. 332 (1975).

[120] *Wilson*, 420 U.S. at 344-45.

[121] *Wilson*, 420 U.S. at 345.

[122] http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-524.pdf at 25 (visited December 29, 2003).



has terminated and the Double Jeopardy Clause bars further proceedings of any type.[123]

In addition to *Smalis*, this Court has rejected similar arguments that attempted to expand the *Wilson* rationale into the area of first-instance acquittals.[124] In *Arizona v. Rumsey*,[125] the jury convicted the defendant of armed robbery and first-degree murder. The trial judge was the sole trier of fact for Rumsey's subsequent death penalty sentencing hearing.[126] Due to a purely legal error, the trial judge rejected the death penalty and sentenced Rumsey to life in prison. Rumsey appealed and the government cross-appealed regarding the sentence.[127] The Arizona Supreme Court affirmed the conviction but remanded for a new sentencing hearing because of the trial judge's legal error.[128] The sentencing hearing on remand amounted to an appellate-court-ordered reconsideration of the prior ruling. No new evidence was presented at the resentencing; only legal arguments were heard before the same judge.[129] After reargument, the judge sentenced Rumsey to death.[130] Unmoved by the lack of new evidence, this Court held that the prohibition against double jeopardy barred

[123] *Fong Foo v. United States*, 369 U.S. 141 (1962); *Smalis*, 476 U.S. at 145.

[124] *Jenkins*, 420 U.S. at 370; *United States v. Finch*, 433 U.S. 676, 677 (1977); *cf. Bullington v. Missouri*, 451 U.S. 430, 446 (1981); *Rumsey*, 467 U.S. at 211-212; *Smalis*, 476 U.S. at 145-46 & n.8.

[125] *Rumsey*, 467 U.S. at 211-212.

[126] *Rumsey*, 467 U.S. at 205; *but see Ring v. Arizona*, 536 U.S. 584 (2002).

[127] *Rumsey*, 467 U.S. at 206-207.

[128] *Rumsey*, 467 U.S. at 206-207.

[129] *Rumsey*, 467 U.S. at 207.

[130] *Rumsey*, 467 U.S. at 208.

any further proceedings[131] and reaffirmed its similar holding in *Bullington v. Missouri*.[132] So too, in Smith's case, the judge's unequivocal finding of not guilty barred further proceedings including "reconsideration" and submission of the firearm charge to the jury. Under *Rumsey*, the prohibition against such "reconsideration" applies regardless of whether either party presented additional evidence on that charge.

The Court also rejected this argument in *United States v. Jenkins*. Like the Appeals Court here, the Government argued in *Jenkins* that appeals of acquittals granted at the close of the prosecution's evidence are permissible because "if the appeal[s are] successful, any subsequent proceedings including, presumably, the reopening of the proceeding for the admission of additional evidence, would merely be a 'continuation of the first trial.'"[133] The Government also noted that, at least in a bench trial, the same judge could "reconvene the case, take up where he left off, and resume his duties as factfinder."[134] But the Court was "unable to accept the Government's contentions" and refused to endorse a concept of "continuing jeopardy" that permitted jeopardy to survive beyond a judicial acquittal, even in a case involving a single continuing trial before the same factfinder.[135]

The government may protest that reliance on *Jenkins* is precluded because *United States v. Scott* overruled

[131] *Rumsey*, 467 U.S. at 211.

[132] *Bullington*, 451 U.S. at 446.

[133] *Jenkins*, 420 U.S. at 368-69.

[134] *Jenkins*, 420 U.S. at 369 n.13.

[135] *Jenkins*, 420 U.S. at 369.



*Jenkins*.[136] But this Court's unanimous opinion in *Smalis* put that argument to rest when it held that *Scott* "overrules *Jenkins* only insofar as *Jenkins* bars an appeal by the government when a defendant successfully moves for dismissal on a ground 'unrelated to factual guilt or innocence.'"[137] Rather than diminishing the force of *Jenkins*' holding, *Smalis* stands as a unanimous endorsement of *Jenkins*' underlying principle. The earlier cases of *Burks v. United States*[138] and *Sanabria v. United States*[139] also lead to the same conclusion reached in *Jenkins* and *Smalis*: once a judge (or panel of judges) truly acquits a defendant, the government is simply not permitted another attempt at conviction, regardless of the form of that attempt.

Indeed, where the *first* factual resolution results in a true acquittal, the Double Jeopardy Clause bars further proceedings of any type even proceedings requiring no further factfinding. This Court made as much clear in *United States v. Finch*.[140] There, the judge "dismissed" the information solely on legal grounds after a stipulated-facts trial. The government sought to appeal and the Ninth Circuit permitted the appeal on the theory now advanced by the Massachusetts Appeals Court: that, under *Wilson*, "no further factual proceedings would be required in the District Court in the event that its legal conclusions were found to be erroneous."[141] But this Court flatly rejected that theory. The Double Jeopardy Clause prohibited the

[136] *Scott*, 437 U.S. at 86-87.

[137] *Smalis*, 476 U.S. at 146 n.9 (*quoting Scott*, 437 U.S. at 99).

[138] *Burks*, 437 U.S. at 16.

[139] *Sanabria*, 437 U.S. at 69, 77-78.

[140] *United States v. Finch*, 433 U.S. 676 (1977).

[141] *Finch*, 433 U.S. at 676.

government's appeal because, as in Smith's case, at the time the prosecution requested reconsideration of the acquittal, there was simply no guilty finding to reinstate.[142]

Here, after failing to convince the judge of the sufficiency of his case, the prosecutor scrambled for permission to "see if he cannot do better a second time"[143] with persuading a second factfinder: the jury. But there is no constitutional, statutory or common law power to "rehear" an acquittal.[144] Rehearing is barred because, in the words of this Court in *Burks*, "the purposes of the Clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple.'"[145]

### E. The Massachusetts courts contravened this Court's settled precedent by requiring Smith to demonstrate prejudice from the violation of his right to be free from being placed twice in jeopardy.

In rejecting Smith's claim, the Massachusetts Appeals Court ruled that Smith "was not otherwise prejudiced by the [reconsideration of the] ruling."[146] That short turn of a phrase stands this Court's Double Jeopardy jurisprudence on its head. Like the complete denial of a defense, gauging the effect of a Double Jeopardy violation is an impossible

[142] *Finch*, 433 U.S. at 677.

[143] *Brock v. North Carolina*, 344 U.S. 424, 429 (1953) (Frankfurter, J. concurring).

[144] *Sanges*, 144 U.S. at 315.

[145] *Burks*, 437 U.S. at 17.

[146] J.A. 127.



calculus.[147] Indeed, it is a calculus that is forbidden by the Constitution. "The public interest in the finality of criminal judgments is so strong that" where a defendant is twice placed in jeopardy, the Constitution "*conclusively presumes*" unfairness.[148] Indeed, in *Price v. Georgia*,[149] this Court explicitly rejected the suggestion that the harmless-beyond-a-reasonable standard[150] applies to double jeopardy violations. As the Court explained in *Burks*, analysis using the rubric of fairness or due process is simply beside the point because

> where the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination.[151]

The Court firmly endorsed this rule in *Crist v. Bretz*,[152] decided on the same day as *Burks*. Thus, a defendant who has been placed twice in jeopardy is not required to make an additional showing of prejudice.[153]

In contrast, the Massachusetts Appeals Court's reasoning that the reconsideration of Smith's acquittal did not prejudice him relied on various considerations including:

[147] *Jorn*, 400 U.S. at 483.

[148] *Brady*, 438 U.S. at 214 (emphasis added, *quoting Washington*, 434 U.S. at 503-505); *DiFrancesco*, 449 U.S. at 129.

[149] *Price*, 398 U.S. at 331.

[150] *See Chapman v. California*, 395 U.S. 250 (1969).

[151] *Burks*, 437 U.S. at 11 n.6; *DiFrancesco*, 449 U.S. at 131.

[152] *Bretz*, 437 U.S. at 37.

[153] *Illinois v. Somerville*, 410 U.S. 458, 471 (1973).

> The defendant has not suggested that the initial allowance of the motion affected his trial strategy with regard to the other charges. Moreover, the Commonwealth did not introduce any additional evidence, and the defendant was provided the opportunity to reopen his case. . . . The jury were not aware that the judge had allowed the motion and the correction of the ruling was made before closing arguments.

First, the transcript conclusively demonstrates that Smith was *not* "provided the opportunity to reopen" in the wake of the judge's reconsideration of Smith's acquittal. The record reveals no such offer. Following reconsideration, the record reveals only the judge's abrupt rejection of Smith's persistent attempts to argue additional grounds in support of his motion for a required finding of not guilty.[154] And given the judge's prior denial of the prosecution's motion to reopen,[155] there is no reason to think that she would have allowed Smith to reopen, much less suggest that Smith reopen. There is simply no basis in the record for the statement that Smith was "provided the opportunity to reopen." Second, the prosecutor did introduce additional evidence after the acquittal: he elicited evidence on cross-examination of Patricia Brown.[156] But even if its factual assertions were true, the Appeals Court's reasoning contradicts the settled law of double jeopardy.

The effect of the withdrawal of Smith's acquittal after the close of evidence and after the charge conference[157]

[154] J.A. 75-76.

[155] J.A. 21-22.

[156] J.A. 42-55.

[157] J.A. 71.



demonstrates the wisdom of conclusively presuming unfairness rather than analyzing for prejudice where the Double Jeopardy Clause has been violated.[158] This is so because reconsideration of an acquittal after further proceedings deforms the adversarial process in real and identifiable ways. Here, it deprived Smith of important adversarial opportunities. The acquitted offense was no longer in issue when he presented his case.[159] So when the judge reconsidered after the close of Smith's case and the jury instruction conference, Smith lost even the opportunity to consider presenting evidence as to the length of the barrel of the firearm. In addition, the Massachusetts unlawful possession of a firearm statute exempts from its reach a person "present in or on his residence or place of business."[160] Smith lost the opportunity to consider presenting evidence as to his right to occupy the premises within that exception.[161] He did not have the opportunity to elicit evidence from Patricia Brown (Felicia Brown's mother and the owner of 33 Lawn Street) regarding Felicia's right to invite Smith to be a temporary resident of 33 Lawn Street. The issue is important, perhaps dispositive. Not long after Smith's trial, the Appeals Court reversed another defendant's conviction for unlawful possession of a firearm because the jury were improperly instructed on the "residence or place of business" exemption. In similar circumstances, the court reasoned that

[158] *Brady*, 438 U.S. at 214; *Washington*, 434 U.S. at 503-505; *DiFrancesco*, 449 U.S. at 129.

[159] J.A. 38-42, 56-58.

[160] M.G.L. c. 269, § 10(a)(1).

[161] M.G.L. c. 269, § 10(a)(1).

> [p]roperly instructed, the jury could have found that [the defendant] Moore was within his residence for purposes of the exemption even if he shared the apartment with roommates, and even if [the defendant] possessed the gun in a roommate's bedroom.[162]

Smith's counsel attempted to argue this very ground but the judge cut him off.[163] Smith lost the opportunity to argue additional grounds for his motion for a required finding of not guilty.[164] And he lost the critical opportunity to ask the Court to instruct the jury on the firearm offense in line with his theories of defense.[165] Indeed, Smith could have argued for a "temporary resident" instruction because the evidence showed that he had been staying in Felicia's room at 33 Lawn Street for at least a week[166] and that the only place he was described as possessing the firearm was within Felicia's room.[167] Had he known that the firearm possession charge was still in the case, he could have asked for a temporary resident instruction.

Instead, Smith's counsel returned from the recess thinking that the firearm charge was no longer at issue. After the judge reconsidered Smith's acquittal, the case proceeded immediately to closing arguments with little or

[162] *Commonwealth v. Moore*, 54 Mass. App. Ct. 334, 345-46, 765 N.E.2d 268, 277, rev. den. sub nom *Commonwealth v. Jones*, 437 Mass. 1102, 772 N.E.2d 588 (2002).

[163] J.A. 75-76.

[164] J.A. 75-76; *Herring v. New York*, 422 U.S. 853, 862 (1975).

[165] J.A. 59-71; *Rogers v. United States*, 422 U.S. 35, 38-40 (1975); *see United States v. Parent*, 954 F.2d 23, 26 (1st Cir. 1992).

[166] (Tr. 3:42, 56).

[167] (Tr. 2:67, 70).



no time for Smith's counsel to re-think his closing argument or request additional instructions.[168] The trial judge instructed the jury on the firearm possession offense without any input from the parties on those instructions whatsoever[169] and the jury then went off to deliberate. In short, counsel for Smith presented his entire case, participated in the jury charge conference, and prepared his closing argument all on the reasonable assumption that the gun possession charge was fully and finally resolved in Smith's favor – only to discover minutes before his closing argument that the firearm charge was back in the case.

So, like *Green*, the forfeiting of Smith's opportunity to defend against the firearm charge "enhanc[ed] the possibility that even though innocent, [the defendant] may be found guilty"[170] because a conviction upon a charge not tried (and not defended against) is fundamentally unfair.[171] Thus, the record in Smith's case affirms the wisdom of conclusively presuming unfairness when defendants are subjected to double jeopardy violations.

### F. The policies embodied in the Double Jeopardy Clause favor the finality of a judgment of not guilty.

Among the "settled" policies underlying the Double Jeopardy Clause,[172] the "constitutional policy of finality for

[168] J.A. 76.

[169] J.A. 77-79.

[170] *Green*, 355 U.S. at 187-88.

[171] *Cf. Jackson v. Virginia*, 443 U.S. 307, 314 (1979); *Cronic v. United States*, 466 U.S. 648 (1984).

[172] *DiFrancesco*, 449 U.S. at 127-132.

the defendant's benefit"[173] assumes particular importance in Smith's case. In *United States v. DiFrancesco*, this Court explained that finality is a primary concern of the Double Jeopardy Clause and that "[a]n acquittal is accorded special weight" within that framework of finality.[174] In the seminal modern case of *Fong Foo*, the Court put this emphasis on finality into effect: even an egregiously erroneous acquittal stands as a final, unreviewable judgment.[175] Over the past four decades, this Court has consistently reaffirmed that first-instance judgments of acquittal are non-appealable.[176] Respecting the Court's long-term commitment to this constitutional policy of finality, Smith consistently argued below, and argues here, that jeopardy barred further proceedings where the first factual resolution of the case after jeopardy attaches resulted in a true acquittal of the defendant.[177] Given the indisputably final nature of the judge's acquittal of Smith, proper respect for this primary policy behind the Double Jeopardy Clause requires that the judgment acquitting Smith be given final and conclusive effect.

Further, this Court has always emphasized the place of the Double Jeopardy Clause within our adversary system.[178] That system affords the government one, and

[173] *Jorn*, 400 U.S. at 479.

[174] *DiFrancesco*, 449 U.S. at 128-130; *Tibbs v. Florida*, 457 U.S. 31, 41 & n.15 (1982).

[175] *Fong Foo*, 369 U.S. at 143.

[176] *See, e.g., Martin Linen*, 430 U.S. at 571-572.

[177] *Martin Linen*, 430 U.S. at 574; J.A. 119 (reply brief in state court).

[178] *See, e.g., Oregon v. Kennedy*, 456 U.S. 667, 680 (1982) (Powell, J. concurring); *see Jorn*, 400 U.S. at 479; *see Scott*, 437 U.S. at 100; *Brock*,

(Continued on following page)



only one, attempt at obtaining a judgment against a criminal defendant. Once a final judgment is rendered, the government's role is complete regardless of alleged residual errors. In the words of Chief Justice Vinson,

> [o]rderly justice could not be secured if the rules allowed the defendant to ask for a mistrial at the conclusion of testimony just because the state had done well and the defense poorly. The same limitation applies to the prosecution if the scales of justice are to be kept in equal balance.[179]

Also relevant is the decision in *Sanabria*. There, the Court rejected the government's appeal of an acquittal entered by the trial judge based on an erroneous exclusion of evidence.[180] The government argued that because the defendant moved to dismiss the indictment, he waived his protection against double jeopardy.[181] This Court rejected that argument because

> [t]o hold that a defendant waives his double jeopardy protection whenever a trial court error in his favor on a mid-trial motion leads to an acquittal would undercut the adversary assumption on which our system of criminal justice rests . . . and would vitiate one of the fundamental rights established by the Fifth Amendment.[182]

The government may argue that such a rule risks freeing the guilty. But as the Court observed in *Bullington*

344 U.S. at 429, 432, 442 (concurring opinion of Frankfurter, J. and dissenting opinions of Vinson, C.J. and Douglas, J.).

[179] *Brock*, 344 U.S. at 432 (Vinson, C.J. dissenting).

[180] *Sanabria*, 437 U.S. at 78.

[181] *Sanabria*, 437 U.S. at 75.

[182] *Sanabria*, 437 U.S. at 78 (citation omitted).

*v. Missouri*, because the government must prove a defendant's guilt beyond a reasonable doubt, "it is the State, not the defendant, that should bear almost the entire risk of error."[183] The reason for this allocation of risk is explained by Friedland in his noted treatise on double jeopardy:

> An obvious result of the rule against double jeopardy is that occasionally guilty persons will escape punishment. But this is inevitable in any system of justice and one cannot tell in advance whether a particular accused is in that class. After most acquittals the police and the prosecutor probably still believe the accused to be guilty and in many of these cases could introduce some additional evidence of guilt. It is to the first trial, however, that their efforts should be directed.[184]

Thus our constitutional system allocates to the *government*, not the defendant, the risk of a prosecutor's incompetence or judge's error.

That rule properly respects the place of a defendant in our adversary system. If defendants know that any offense on which they obtain a directed verdict is still subject to further prosecution, they may simply lack the "stamina and resources" to continually fight off repeated motions for reconsideration. They may forego the right to trial and instead plead guilty upon encountering a prosecutor known to be persistent.[185]

[183] *Bullington*, 451 U.S. at 446 (citation and internal quotation marks omitted).

[184] Friedland, Double Jeopardy 4 (1969).

[185] Friedland, Double Jeopardy 4 (1969).



Moreover, beyond the immediate facts of Smith's case, the implications of the Massachusetts Appeals Court threaten our adversarial system. Imagine that Smith stood trial for the firearm charge only. Upon the judge finding him not guilty, Smith and his counsel could have simply gone home. But, still present to hear the case against Smith's codefendant, the jury would have remained constituted exactly as it was at the beginning of Smith's trial. Under the Appeals Court's theory, a judge could later "reconsider" that acquittal and hail Smith back into Court merely "because the charge was submitted to the same jury that had heard the evidence"[186] prior to Smith's acquittal. This precise hypothetical, not at all farfetched, appeared to trouble this Court at oral argument in *Vincent*.[187]

Concern is warranted. Under the government's rationale, this Court could have remanded in *Smalis* and *Rumsey* to the same factfinder: the judge. If accepted, the Massachusetts Appeals Court's holding completely overrules both of these cases. If acquittals are to be so lacking in import for the final termination of jeopardy, nothing appears to prevent the government from devising a scheme of keeping a jury intact merely to enable a government appeal of a fully-litigated jury verdict of not guilty. If the jurors have not been discharged, the prosecution is free to try, try again. Chief Justice Vinson aptly

[186] J.A. 124.

[187] http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-524.pdf at 25 (visited December 29, 2003).

labeled similar tactics "stains upon the administration of justice."[188]

Further, under the Appeals Court's theory, a prosecutor could move for reconsideration of a bench-trial acquittal weeks after the acquittal. Armed with newly produced transcripts, better researched memoranda, and a well-practiced presentation, the prosecutor could seek the now-forbidden second bite at the apple. Reconsideration of the acquittal would only result in a continuation of the prior proceeding before the same finder of fact, so the Double Jeopardy Clause would afford the defendant no protection. Alternatively, the trial judge could resurrect a previously dismissed charge after the defendant had fully committed to presenting evidence responsive only to the remaining charges or, even worse, after the defendant has presented evidence helpful to the remaining charges but damaging to the resurrected one. A defendant's decisions regarding what evidence and arguments to present, whether and how to testify, what motions to make, and how to plead depend entirely on which charges remain at issue when the defense case is presented. The defendant cannot make these crucial decisions intelligently at the start of his case if there is always a chance that acquitted charges could pop back into existence at any time during – or even after – his presentation. The defendant must therefore remain in a heightened state of "anxiety and insecurity" throughout the trial, and "even though innocent he may be found guilty."[189]

---

[188] *Brock*, 344 U.S. at 434 (Vinson, C.J. dissenting) (*quoting In re Speir*, 12 N.C. 491, 493, 494, 498, 499, 502 (1828)); *see also Bretz*, 437 U.S. at 43 n.4 (Burger, C.J. dissenting).

[189] *Green*, 355 U.S. at 187-88.



## CONCLUSION

This Court should reverse the judgment of the Massachusetts Appeals Court and remand to that court with directions to enter a judgment of not guilty of the firearm charge.

Respectfully submitted,

DAVID NATHANSON
COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 Bromfield Street
Boston, MA 02108
617-482-6212

*Counsel for Petitioner*

Supreme Court, U.S.
FILED
NOV 1 - 2004
OFFICE OF THE CLERK

No. 03-8661

IN THE

# Supreme Court of the United States

**MELVIN T. SMITH,**
***Petitioner,***
*v.*
**COMMONWEALTH OF MASSACHUSETTS,**
***Respondent.***

***ON WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS***

## BRIEF FOR RESPONDENT

**THOMAS F. REILLY**
***Attorney General of Massachusetts***

**CATHRYN A. NEAVES***
***Assistant Attorney General***
**DEAN A. MAZZONE**
***Special Assistant Attorney General***
**DAVID M. LIEBER**
***Assistant Attorney General***
**JOSEPH M. DITKOFF**
***Special Assistant Attorney General***
**One Ashburton Place**
**Boston, Massachusetts 02108**
**(617) 727-2200**

****Counsel of Record***

## QUESTION PRESENTED

In a jury trial, may the judge reconsider her legal ruling allowing a motion for directed verdict and submit the charge to the original jury without twice placing the defendant in jeopardy?

## TABLE OF CONTENTS


QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE ..... 1

SUMMARY OF THE ARGUMENT ..... 6

ARGUMENT ..... 9

THE DOUBLE JEOPARDY CLAUSE IS NOT VIOLATED BY A JUDGE'S RECONSIDERATION AND WITHDRAWAL OF A RULING ALLOWING A MOTION FOR DIRECTED VERDICT, AFTER WHICH THE ORIGINALLY IMPANELED JURY CONVICTS THE DEFENDANT. ..... 10

I. The Double Jeopardy Clause Bars A Second Prosecution After A Defendant's "Particular Tribunal" Has Acquitted Him ..... 10

II. A Judge's Ruling Granting A Motion For Directed Verdict During A Jury Trial Is Not Effectively An Acquittal For Double Jeopardy Purposes If The Originally Impaneled Jury Has Not Yet Been Discharged ..... 13

A. A trial judge presiding over a jury trial has no authority to resolve the facts either in favor of or against a defendant ..... 13

B. A trial judge's mid-jury trial grant of a directed verdict does not have the effect of an acquittal because state law authorizes judges to reconsider their own decisions ..... 15

C. This Court's rulings are consistent with the proposition that legal rulings alone–including grants of directed verdicts–do not function as acquittals for purposes of the Double Jeopardy Clause ..... 16

*i. Rulings made after jury discharge have the effect of acquittals* ..... 16

*ii. Legal rulings that do not affect a factfinder's ability to weigh the evidence are not acquittals* ..... 17

D. This Court's decisions in bench trial cases are not to the contrary ..... 18



III. The Policies Underlying The Double Jeopardy Clause Support A Trial Judge's Authority To Reconsider A Ruling Made Mid-Jury Trial, Granting A Motion For Directed Verdict ..... 20

A. Double jeopardy policies support this understanding of what constitutes an acquittal ..... 20

B. A rule precluding reconsideration might remove the motion for directed verdict as a protection available to criminal defendants ..... 23

C. The Due Process Clause, not the Double Jeopardy Clause, is implicated by a defendant's contention that he suffered prejudice due to a judge's reconsideration of a legal ruling ..... 24

IV. Smith's Conviction Of Unlawful Possession Of A Firearm By The First And Only Jury Impaneled And Sworn Did Not Violate The Double Jeopardy Clause ..... 25

CONCLUSION ..... 30

## TABLE OF AUTHORITIES

### CASES


*Arizona v. Rumsey*, ..... 19, 22
467 U.S. 203 (1984)

*Arizona v. Washington*, ..... *passim*
434 U.S. 497 (1978)

*Ball v. United States*, ..... 9
163 U.S. 662 (1896)

*Benton* v. *Maryland*, ..... 10n
395 U.S. 784 (1969)

*Bradford* v. *Knights*, ..... 15-16
427 Mass. 748,
695 N.E.2d 1068 (1998)

*Burks* v. *United States*, ..... *passim*
437 U.S. 1 (1978)

*Commonwealth* v. *Anthes*, ..... 14n
71 Mass. 185,
5 Gray 185 (1855)

*Commonwealth* v. *Cote*, ..... 5
15 Mass. App. Ct. 229,
444 N.E.2d 1282 (1983)

*Commonwealth* v. *Cronk*, ..... 16
396 Mass. 194,
484 N.E.2d 1430 (1985)





*Commonwealth* v. *Davis*, ..... 14n
271 Mass. 99,
170 N.E. 924 (1930)

*Commonwealth* v. *Downs*, ..... 16
31 Mass. App. Ct. 467,
579 N.E.2d 679 (1991)

*Commonwealth* v. *Haskell*, ..... 15, 27
438 Mass. 790,
784 N.E.2d 625 (2003)

*Commonwealth* v. *Lowder*, ..... 6-7, 14, 14n, 15n
432 Mass. 92,
731 N.E.2d 510 (2000)

*Commonwealth* v. *Smith*, ..... 5
440 Mass. 1104,
797 N.E.2d 380 (2003)

*Commonwealth* v. *Sperrazza*, ..... 26n, 27n
372 Mass. 667,
363 N.E.2d 673 (1977)

*Crist* v. *Bretz*, ..... 9, 11, 12, 20
437 U.S. 28 (1978)

*Downum* v. *United States*, ..... 9
372 U.S. 734 (1963)

*Fine* v. *Commonwealth*, ..... 16, 27
312 Mass. 252,
44 N.E.2d 659 (1942)

*Fong Foo* v. *United States*, ..... 22
369 U.S. 141 (1962)

*Galloway* v. *United States*, ..... 14n, 23
319 U.S. 372 (1943)

*Green* v. *United States*, ..... *passim*
355 U.S. 184 (1957)

*Greene* v. *Massey*, ..... 17
437 U.S. 19 (1978)

*Hudson* v. *Louisiana*, ..... 17
450 U.S. 40 (1981)

*Illinois* v. *Somerville*, ..... 12
410 U.S. 458 (1973)

*Justices of the Boston Mun. Ct.* v. *Lydon*, ..... 28
466 U.S. 294 (1984)

*Kepner* v. *United States*, ..... 12
195 U.S. 100 (1904)

*Lee* v. *United States*, ..... 6, 13, 18
432 U.S. 23 (1977)

*Lockhart* v. *Nelson*, ..... 18, 20, 21, 28
488 U.S. 33 (1988)

*Ohio* v. *Johnson*, ..... 22
467 U.S. 493 (1984)

*Oregon* v. *Kennedy*, ..... 23
456 U.S. 667 (1982)



*Price* v. *Georgia*, ..... 28
398 U.S. 323 (1970)

*Price* v. *Vincent*, ..... 9, 19
538 U.S. 634 (2003)

*Sanabria* v. *United States*, ..... 11, 15
437 U.S. 54 (1978)

*Serfass* v. *United States*, ..... 9, 19
420 U.S. 377 (1975)

*Smalis* v. *Pennsylvania*, ..... 15, 17, 19
476 U.S. 140 (1986)

*Sparf* v. *United States*, ..... 14, 14n
156 U.S. 51 (1895)

*Stroud* v. *United States*, ..... 11
251 U.S. 15 (1919)

*Tibbs* v. *Florida*, ..... 7, 12, 18, 23-24
457 U.S. 31 (1982)

*United Brotherhood of Carpenters* v. *United States*, ..... 14
330 U.S. 395 (1947)

*United States* v. *Hollywood Motor Car Co., Inc.*, ..... 25
458 U.S. 263 (1982)

*United States* v. *Jenkins*, ..... 13, 19
420 U.S. 358 (1975)

*United States* v. *Jorn*, ..... 22, 23
400 U.S. 470 (1971)

*United States* v. *Martin Linen Supply Co.*, ..... *passim*
430 U.S. 564 (1977)

*United States* v. *Scott*, ..... *passim*
437 U.S. 82 (1978)

*United States* v. *Wilson*, ..... *passim*
420 U.S. 332 (1975)

*Wade v. Hunter*, ..... 9, 12, 20, 21
336 U.S. 684 (1949)

*Youakim v. Miller*, ..... 3n, 29n
425 U.S. 231 (1976)

CONSTITUTION, STATUTES, AND RULES

Amend. V (Double Jeopardy Clause) ..... *passim*

Amend. V (Due Process Clause) ..... 8, 24, 25, 29

Supreme Court Rule 14.1(a) ..... 29n

Mass. Gen. Laws ch. 278, § 11A ..... 4n

Massachusetts Rule of Criminal Procedure 25 ... *passim*

MISCELLANEOUS

WILLIAM BLACKSTONE, COMMENTARIES ..... 10



IN THE

# Supreme Court of the United States

---

No. 03-8661

MELVIN T. SMITH,
*Petitioner*,

*v.*

COMMONWEALTH OF MASSACHUSETTS,
*Respondent.*

---

*ON WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS*

---

## BRIEF FOR RESPONDENT

---

## STATEMENT OF THE CASE

Petitioner Melvin Smith's girlfriend and co-defendant, Felicia Brown, lived with her family in a triple decker dwelling in the Jamaica Plain section of Boston. J.A. 104, 121-22. On the date of the shooting, the victim, Christopher Robinson, who was Brown's cousin, was staying at the house while Brown's mother was away. Trial Transcript, volume 2, pages 52-53 (hereinafter cited as "Tr. volume/page").

At 4:00 a.m. on August 16, 1996, Robinson went down the stairs from the third floor of the house to lie down. J.A. 122. As he reached the bottom of the stairs, he saw Brown and Smith in Brown's bedroom. J.A. 12. Smith was holding what appeared to be a .38 or .32 caliber pistol. J.A. 12, 13, 14, 16-17, 122. As soon as Robinson got down to the second floor, Smith shot him three times. J.A. 12. Smith then said to Brown, "let's go." J.A.

13. Robinson said, "I know who you are, Melvin. Why you shoot me? Why you shoot me? I know who you are. Your name is Melvin." J.A. 122. The shooting caused Robinson severe injuries, destroying his digestive tract. J.A. 122.

On September 26, 1996, a grand jury indicted Smith for armed assault with intent to murder and assault and battery by means of a dangerous weapon. J.A. 120-21. On October 8, 1998, a grand jury indicted him for unlawfully possessing a firearm (fourth offense).[1] J.A. 9-10. Smith's trial before a jury began on November 4, 1998. J.A. 2. The victim, Christopher Robinson, testified during the Commonwealth's case that Smith was the person who shot him and that the gun Smith used to shoot him was a "pistol," a "revolver," and a ".32 or a .38." J.A. 12, 13, 14, 16-17, 122, 124. After the Commonwealth rested, Smith moved for required findings of not guilty as to all indictments. J.A. 20. As to the indictment for unlawful possession of a firearm, Smith argued that the Commonwealth had not presented direct evidence that the gun barrel's length was less than sixteen inches, an element of the offense. J.A. 20-21, 98-101. After a brief hearing outside the presence of the jury, the trial judge allowed the motion. J.A. 22. Her decision was noted on the face of the motion by the clerk and ultimately entered on the docket, but was not communicated to the jury. J.A. 3, 22, 123.[2]

The trial continued that same morning. J.A. 22. Smith himself presented no witnesses, while Felicia Brown, who was

---

[1]The Commonwealth initially indicted Smith for unlawfully possessing a firearm (third offense), but entered a *nolle prosequi* and re-indicted for a fourth offense violation in order to account for Smith's three prior convictions. Tr. 1/4-10.

[2]The judge denied Smith's separate motion for required finding of not guilty as to his indictments for assault with intent to murder and assault and battery by means of a dangerous weapon. J.A. 22. Smith did not appeal the denial of that separate motion.



charged with being an accessory after the fact, called her mother to testify. J.A. 22-58, 121. That afternoon, after the defense rested, J.A. 58-59, but before closing arguments and the jury charge, the prosecutor presented the trial judge with a Massachusetts Supreme Judicial Court case which held that evidence that the gun was a "handgun" or a "revolver" would suffice to satisfy the element of the offense regarding gun-barrel length. J.A. 71. The trial judge heard argument from counsel about the import of the Supreme Judicial Court decision, along with the cases initially cited by Smith in his motion, one of which concerned a shotgun and two of which were concerned with a conceded absence of evidence regarding gun-barrel length. J.A. 71-74. At the end of this discussion about the law governing this element, the trial judge determined that she should submit the charge to the jury. J.A. 74. Smith neither objected nor asked to present evidence in his defense.[3] *Id.*

The next day, while the jury was deliberating, Smith asked the trial judge to reconsider her decision to submit the firearm charge to the jury, citing further authority regarding proof of gun-barrel length for the court's consideration. J.A. 81. After hearing further argument from counsel, the judge took the matter under advisement. J.A. 89. On the next trial day, the judge denied

---

[3]At this point, Smith did ask to further argue two other points that were contained in his written motion for required finding as to this charge, namely assertions that he was either "at home" or was Brown's guest when he shot Robinson. Either assertion, he claimed, entitled him to an exemption from the statute's provisions. J.A. 75-76, 99-100. Neither theory was supported by the evidence and neither was raised to the Massachusetts Appeals Court on appeal. (Because Smith failed to present these points to the Appeals Court for its review, this Court should not consider them here. *See Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]").) After acknowledging that she understood these alternative bases for Smith's motion, the trial judge reiterated that the motion was denied. J.A. 76.

Smith's motion to reconsider. J.A. 92. That same day, the jury convicted Smith of all charges. J.A. 93-95, 102.

Smith waived a jury trial as to the statutorily mandated separate proceeding concerning whether his firearm conviction was his fourth such offense, and the court convicted him after hearing the evidence of his three prior convictions for unlawful possession of a firearm.[4] J.A. 96. The trial judge sentenced Smith to twelve to fifteen years for his conviction for armed assault with intent to murder, to a concurrent nine to ten years for his conviction for assault and battery by means of a dangerous weapon, and to a concurrent ten to twelve years for the firearm charge.[5] J.A. 96-97.

After his trial, Smith filed a motion for new trial, asserting among other matters that his double jeopardy rights were violated by the trial judge's reconsideration of her initial grant of his motion for a required finding as to the firearm charge. J.A. 7, 107. The trial judge denied the motion, determining that no such violation occurred because Smith was not subjected to a second trial, because the court's error was corrected before closing arguments, and because Smith had the option to re-open his case. J.A. 107-11.

The Appeals Court affirmed both the trial court's denial of Smith's motion for new trial and his convictions. J.A. 120-38. As to Smith's double jeopardy claim, the court determined that no such violation occurred "because the judge's correction of her

---

[4]In Massachusetts, a defendant who is indicted for and convicted of a crime that will expose him to a greater sentence due to his prior conviction(s) for the same crime is entitled to a separate jury trial, with all the protections attendant at criminal trials, concerning whether his conviction is a "subsequent offense." MASS. GEN. LAWS ch. 278, § 11A.

[5]Christopher Robinson subsequently died from the injuries he suffered in the shooting. Smith has been indicted for first-degree murder, which indictment currently is awaiting trial. J.A. 105.



ruling did not require a second proceeding," J.A. 125, and noted that Smith had "'no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.'" *Id.* (quoting *United States* v. *Wilson*, 420 U.S. 332, 345 (1975)).

Smith also claimed that reconsideration violated Massachusetts Rule of Criminal Procedure 25, the rule governing motions for required findings of not guilty. J.A. 114 n.11. The Appeals Court rejected this state-law claim, holding that the purpose served by the rule, namely, "'to insist that the Commonwealth present proof of every element of the crime with which he is charged before he decides whether to rest or to introduce proof in a contradiction or exoneration,'" was served in this case. J.A. 126 (quoting *Commonwealth* v. *Cote*, 15 Mass. App. Ct. 229, 240, 444 N.E.2d 1282, 1289-90 (1983)). Specifically, the court highlighted the facts that Smith made no suggestion that his trial strategy as to the other charges was altered by the trial judge's actions and that he had an opportunity to re-open his case. *Id.* The court further held that nothing about Rule 25 precluded a trial judge from exercising her power to correct a ruling in this manner. *Id.* In this regard, the court observed that the evidence concerning the firearm charge was sufficient as a matter of law and that Smith was not prejudiced by the correction where the jury was never informed of the trial judge's actions and the correction occurred before closing arguments. J.A. 126-27.

The Massachusetts Supreme Judicial Court denied Smith's application for leave to obtain further appellate review on October 3, 2003. *Commonwealth* v. *Smith*, 440 Mass. 1104, 797 N.E.2d 380 (2003). On December 31, 2003, Smith filed a petition in this Court seeking a writ of certiorari, which this Court granted on June 14, 2004.

## SUMMARY OF THE ARGUMENT

1. The Double Jeopardy Clause encompasses the universal maxim that no person should be placed in jeopardy twice for the same offense. A defendant's right to have his particular tribunal held together until it determines the facts of the offenses he faces helps to effectuate this maxim, because it is the link between the two separate but related concerns that fuel the Double Jeopardy Clause's prohibition against second prosecutions. First, the Double Jeopardy Clause embodies a res judicata principle of respecting final factual determinations, whether of guilt or of innocence. Second, the Clause protects against government oppression by barring the prosecution from multiple opportunities to convict a defendant, either by improving its case or by finding a more sympathetic jury.

2. Thus, final judgments of acquittal are entitled to deference, because of the risk of a second trial that would exist if review of such factual resolutions regarding the charged offenses were permitted. Only those determinations that "'actually represent a resolution, correct or not, of some or all of the factual elements of the offense charged,'" however, constitute acquittals for double jeopardy purposes. *Lee* v. *United States*, 432 U.S. 23, 30 n.8 (1977) (quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). For several reasons, a trial judge's mid-jury trial legal ruling granting a motion for directed verdict does not constitute an acquittal for double jeopardy purposes and, as such, may be reconsidered up until the defendant's particular tribunal, the jury, is discharged.

3. First, trial judges presiding over jury trials have no authority to acquit or convict defendants because they are not entitled to resolve the facts. *United States* v. *Martin Linen Supply*, 430 U.S. at 572-73. Rulings on motions for directed verdicts are legal rulings, decided on the basis of governing law, with the facts deemed to be undisputed. *See Commonwealth* v.



*Lowder*, 432 Mass. 92, 96-97, 731 N.E.2d 510, 515 (2000); *see also Burks* v. *United States*, 437 U.S. 1, 16 (1978). At most, trial judges' mid-jury trial legal rulings granting directed verdicts can have the *effect* of acquittals, but only if such grants are followed by discharging the entity that has the authority to resolve the facts, *i.e.*, the jury. Second, mid-jury trial legal decisions granting motions for directed verdicts do not have the effect of acquittals because judges have longstanding power to reconsider their rulings while proceedings are pending. While states cannot diminish defendants' double jeopardy rights through their characterizations of state law, the fact that judges have such a well-established common law power to reconsider their decisions is relevant to considering what effect such legal rulings have on defendants.

4. This Court's decisions that legal rulings standing alone do not function as acquittals for purposes of the Double Jeopardy Clause are consistent with the notion that rulings on motions for directed verdict, in and of themselves, do not function as acquittals. On each occasion when this Court has determined that review of a legal ruling deeming the evidence insufficient violated the Double Jeopardy Clause, the judge was effectively acting as the factfinder, either because the jury had been discharged when the ruling was made, because the jury was discharged after the ruling was made, or because the defendant had waived his right to a jury. By contrast, this Court consistently has held that a judge's legal rulings that do not affect the factfinder's ability to weigh the evidence may be reviewed without violating the Double Jeopardy Clause. Even an appellate court's determination that a conviction is against the weight of the evidence is not a bar to retrial because an acquittal is not the only proper verdict that the factfinder could return. *Tibbs* v. *Florida*, 457 U.S. 31, 42 (1982). To be sure, this Court, recognizing that bench trials present the distinct, difficult issue that judges are both factfinders and law givers in that context, has treated legal rulings by judges presiding over bench trials as if they were factual

determinations for double jeopardy purposes. This approach, however, neither applies to jury trials nor detracts from the conclusion that trial judges presiding over jury trials may reconsider their legal rulings up until the jury is discharged.

5. The policies that animate the Double Jeopardy Clause are not offended by a conclusion that a trial judge may reconsider her mid-jury trial legal rulings. A trial judge's correction of an erroneous legal ruling made during a jury trial results in only one resolution of the facts, determined by the first and only jury impaneled and sworn for that purpose. The prosecution is not permitted the opportunity to "hone" an insufficient case; indeed, the legal correction is a recognition that the evidence is sufficient to send the charge to the jury. Treating these legal rulings as acquittals for double jeopardy purposes would have the deleterious effect of placing defendants against whom the evidence is sufficient outside the reach of the law and, hence, could tend to reduce the effectiveness of motions for directed verdict as a protection for criminal defendants. Any prejudice that defendants may suffer as a result of such reconsideration falls within the framework of due process and can be remedied, when necessary, by a new trial.

6. Smith's double jeopardy rights were not violated by the trial judge's exercise of her well-established common-law authority to reconsider her legal ruling erroneously granting his motion for required finding of not guilty. The evidence presented at Smith's trial was sufficient to send the charge to the jury; the trial judge's correction of her legal error permitted the sole factfinder to do its work. Smith was subjected to one trial before one jury. Jeopardy attached when Smith's jury was sworn, and that jeopardy terminated upon the jury's verdicts of guilty. Double jeopardy principles require nothing more.



## ARGUMENT

A criminal defendant's right to have his guilt or innocence determined by a particular jury is at the core of the guarantee provided by the Double Jeopardy Clause. *See Arizona* v. *Washington*, 434 U.S. 497, 507-08 & n.23 (1978) (discussing jury value in historical context of English judges' dismissals of juries when it appeared they would acquit); *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949) (defendant has right to have case determined by "particular tribunal"). It is elemental, then, that the Double Jeopardy Clause protects an individual from being tried for the same offense after his particular jury has rendered a judgment of acquittal. *Ball* v. *United States*, 163 U.S. 662, 669 (1896); *see Price* v. *Vincent*, 538 U.S. 634, 641 (2003) (on habeas review, noting Michigan Supreme Court's recognition that acquittal bars second prosecution for same offense); *United States* v. *Wilson*, 420 U.S. at 347 (explaining that appellate review of acquittal barred because of risk of second trial after first finder of fact ruled in defendant's favor). This rule specifically protects a defendant from being placed in jeopardy twice. *Ball* v. *United States*, 163 U.S. at 669. At a jury trial, jeopardy attaches when the jury is sworn. *Crist* v. *Bretz*, 437 U.S. 28, 35 (1978) (citing *Downum* v. *United States*, 372 U.S. 734, 735-36 (1963)); *United States v. Martin Linen Supply*, 430 U.S. at 569; *Serfass v. United States*, 420 U.S. 377, 388 (1975). As a general matter, that jeopardy terminates when the original jury is discharged. *Green v. United States*, 355 U.S. 184, 191 (1957). Therefore, where a trial judge, during a jury trial, reconsiders her grant of a motion for directed verdict and submits the charge to the first and only jury sworn to render a verdict on the facts, the defendant has been subjected to only one jeopardy. The Double Jeopardy Clause does not preclude reconsideration of such a legal ruling, so long as the defendant's first jury remains sworn and available to conduct its work as the finder of fact.

## THE DOUBLE JEOPARDY CLAUSE IS NOT VIOLATED BY A JUDGE'S RECONSIDERATION AND WITHDRAWAL OF A RULING ALLOWING A MOTION FOR DIRECTED VERDICT, AFTER WHICH THE ORIGINALLY IMPANELED JURY CONVICTS THE DEFENDANT.

### I. The Double Jeopardy Clause Bars A Second Prosecution After A Defendant's "Particular Tribunal" Has Acquitted Him.

1. The Double Jeopardy Clause states: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.[6] The Clause is derived from the English common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon. As Blackstone noted, "the plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." 4 WILLIAM BLACKSTONE, COMMENTARIES *329, *quoted in Green* v. *United States*, 355 U.S. at 187. The Clause effectuates that maxim by generally requiring that a chosen jury be held together, a rule that derives from the "abhorrent practice" in England by which English judges discharged juries prior to verdict when the Crown's evidence appeared to be insufficient. *See Arizona* v. *Washington*, 434 U.S. at 507-08 & n.23 (discussing history resulting in requirement of manifest necessity to discharge jury before verdict reached).

---

[6]The Double Jeopardy Clause has been incorporated into the Fourteenth Amendment and made applicable to the States. *Benton* v. *Maryland*, 395 U.S. 784, 794-95 (1969).



This Court has consistently emphasized that the particular danger the Clause is intended to guard against is successive prosecutions for the same offense. *See, e.g.*, *Sanabria* v. *United States*, 437 U.S. 54, 63 (1978) ("the primary purpose of the Double Jeopardy Clause was to prevent successive trials"); *United States* v. *Wilson*, 420 U.S. at 342 ("The development of the Double Jeopardy Clause from its common-law origins thus suggests that it was directed at the threat of multiple prosecutions . . . ."); *Stroud* v. *United States*, 251 U.S. 15, 18 (1919) ("The protection afforded by the Constitution is against a second trial for the same offense."). Historically, this prohibition of multiple prosecutions arises from two distinct, but related, concerns.

The first concern is that final factual determinations should be protected. The Double Jeopardy Clause works to preserve final judgments, whether of acquittal or conviction. As this Court observed in *Arizona* v. *Washington*, "[i]f the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." 434 U.S. at 503; *see also United States* v. *Scott*, 437 U.S. 82, 92 (1978) (historically, "the primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment"); *Crist* v. *Bretz*, 437 U.S. at 33 (double jeopardy bar to second trial after judgment of acquittal or conviction akin to res judicata principles).

The second concern underlying the prohibition of multiple prosecutions is that the government not receive multiple chances to garner a conviction, either by improving its evidence or by finding a more sympathetic jury. Barring re-prosecution after a final judgment of acquittal guards against the "unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'" *United States* v. *Scott*, 437 U.S. at 91 (quoting *Green* v. *United States*, 355 U.S. at 188). Nor is the prosecution permitted a second trial in order to hone a case that the first

factfinder has evaluated and rejected. *Tibbs* v. *Florida*, 457 U.S. at 41 ("'[the] Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.'" (quoting *Burks* v. *United States*, 437 U.S. at 11) (alteration in the original)).

The crucial link holding together the dual double jeopardy principles in favor of finality of judgments and against second trials is the constitutional value of the defendant's "right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U.S. at 689; *see Illinois* v. *Somerville*, 410 U.S. 458, 471 (1973) (in context of mistrial, "the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one."). Specifically, "[b]ecause jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Arizona* v. *Washington*, 434 U.S. at 503 (quoting *Wade* v. *Hunter*, 336 U.S. at 689). Indeed, this Court has drawn the line for attachment of jeopardy in a jury trial at when the jury is impaneled and sworn in recognition of "the need to protect the interest of the accused in retaining a chosen jury." *Crist* v. *Bretz*, 437 U.S. at 35. As this Court has noted, "[t]hroughout that [Anglo-American system of criminal justice] history there ran a strong tradition that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict." *Id.* at 36.

2. In light of the foregoing principles, double jeopardy jurisprudence accords special deference to a final judgment of acquittal. *Tibbs* v. *Florida,* 457 U.S. at 41; *Kepner* v. *United States*, 195 U.S. 100, 130 (1904). This is so because review of an acquittal "would expose the defendant to a risk of a second trial after the finder of fact had ruled in his favor in the first." *United States* v. *Wilson*, 420 U.S. at 346-47.

The key question then, in determining the effect of a trial judge's reconsideration of an order granting a motion for required



finding of not guilty, is what constitutes an acquittal for double jeopardy purposes. This Court has defined the parameters: "a trial court's ruling in favor of a defendant is an acquittal only if it 'actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Lee* v. *United States*, 432 U.S. at 30 n.8 (quoting *United States* v. *Martin Linen Supply*, 430 U.S. at 571). When a jury returns a not-guilty verdict, the answer is simple: the jury has resolved the facts in the defendant's favor and a second prosecution is barred by the Double Jeopardy Clause. *See United States* v. *Jenkins*, 420 U.S. 358, 366 (1975) ("the distinction between the jury's verdict of guilty and the court's ruling on questions of law is easily perceived"), *overruled on other grounds*, *United States* v. *Scott*, 437 U.S. at 87-88.

The matter is more complicated when one considers the effect of a trial judge's mid-trial reconsideration of a legal ruling granting a motion for directed verdict. For the reasons set forth below, a trial judge's order, made during a jury trial, granting a motion for directed verdict is not an "acquittal" for double jeopardy purposes and may be reconsidered up until the defendant's particular tribunal, *i.e.*, the jury, is discharged.

## II. A Judge's Ruling Granting A Motion For Directed Verdict During A Jury Trial Is Not Effectively An Acquittal For Double Jeopardy Purposes If The Original Impaneled Jury Has Not Yet Been Discharged.

### A. A trial judge presiding over a jury trial has no authority to resolve the facts either in favor of or against a defendant.

A trial judge, when she presides over a jury trial, has no authority to convict or acquit a defendant, because she does not have the authority to resolve the facts. *See United States* v.

*Martin Linen Supply*, 430 U.S. at 572-73 (citing *Sparf* v. *United States*, 156 U.S. 51, 105 (1895); *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 408 (1947)) (trial judge has no power to direct a jury to convict a defendant). A trial judge's ruling on a motion for directed verdict is a *legal* one, in which the facts are deemed to be undisputed. *See Commonwealth* v. *Lowder*, 432 Mass. at 96-97, 731 N.E.2d at 515 (motions for required finding present legal questions within trial judge's purview); *see also Burks* v. *United States*, 437 U.S. at 16 ("[T]he trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal.").[7]

The most a trial judge can do is issue an order that has the effect of an acquittal by granting such a motion and then discharging the factfinder, *i.e.*, the jury. The judge's power to do so, however, does not rest upon her mere legal ruling. The judge's ruling that the evidence is insufficient is final and acts as an acquittal only when the jury is discharged, because there no longer is an opportunity for the defendant's particular tribunal to

---

[7]Indeed, prior to 1845, juries in Massachusetts were empowered to decide *both* the facts and the law in criminal trials. It was Chief Justice Shaw's decision in *Commonwealth* v. *Anthes*, 71 Mass. 185, 5 Gray 185 (1855), that conclusively determined "that the jury in criminal trials have no rightful power to determine questions of law against the instructions of the court." *Commonwealth* v. *Davis*, 271 Mass. 99, 100, 170 N.E. 924, 924 (1930); *see Galloway* v. *United States*, 319 U.S. 372, 399 n.5 (1943) (Black, J., dissenting) ("The early practice under which juries were empowered to determine issues of law in criminal cases was not formally rejected by this Court until 1894 in Sparf v. United States, 156 U.S. 51, when the subject was exhaustively discussed"). From that point up to today, a motion challenging the sufficiency of the evidence in Massachusetts is a legal matter within the trial judge's authority. *Commonwealth* v. *Lowder*, 432 Mass. at 97, 731 N.E.2d at 515.



weigh the evidence.[8] *See Sanabria* v. *United States*, 437 U.S. at 78 (because trial judge's erroneous legal ruling led to acquittal, double jeopardy barred retrial). So long as the jury remains impaneled and sworn, however, such a ruling cannot have the effect of an acquittal because the jury remains in place to serve as the ultimate, and indeed the only, factfinder.

### B. A trial judge's mid-jury trial grant of a directed verdict does not have the effect of an acquittal because state law authorizes judges to reconsider their own decisions.

The reason that a trial judge's mid-jury trial grant of a directed verdict does not have the *effect* of an acquittal is that judges have the longstanding and well-established power to reconsider their own decisions. Although a state cannot undermine a defendant's rights under the Double Jeopardy Clause through its characterization of state law, *see Smalis* v. *Pennsylvania*, 476 U.S. 140, 144 n.5 (1986), state law nonetheless remains the background against which the Double Jeopardy Clause operates and is relevant to gauging the effect a judge's order has on a defendant.

In Massachusetts, "[a] judge's power to reconsider his own decisions during the pendency of a case is firmly rooted in the common law . . . ." *Commonwealth* v. *Haskell*, 438 Mass. 790, 792, 784 N.E.2d 625, 628 (2003). The boundaries for the exercise of this discretion are wide. A court's "inherent power . . . to rehear and reconsider its own determinations at its discretion has long been recognized," at least where reconsideration violates "no other provision of law." *Bradford* v.

---

[8]For example, a Massachusetts trial judge has the power to direct a verdict as early as immediately after the prosecution delivers its opening statement, before any evidence has been presented at all. *Commonwealth* v. *Lowder*, 432 Mass. at 99, 731 N.E.2d at 517.

*Knights*, 427 Mass. 748, 752, 695 N.E.2d 1068, 1071 (1998); *see Commonwealth* v. *Downs*, 31 Mass. App. Ct. 467, 469, 579 N.E.2d 679, 681 (1991) ("Judges are not condemned to abstain from entertaining second thoughts that may be better ones"). Further, there are few time limits on a judge's exercise of this discretion. In fact, a Massachusetts court may reconsider a final order even after a notice of appeal has been filed. *See Commonwealth* v. *Cronk*, 396 Mass. 194, 197, 484 N.E.2d 1330, 1333 (1985) (court may reconsider until the appeal is entered in the appellate court). As the Supreme Judicial Court has noted, "[w]e are dealing with the power of a court that has general jurisdiction. It ought to be free to exercise that jurisdiction to the end that justice may be served." *Fine* v. *Commonwealth*, 312 Mass. 252, 260, 44 N.E.2d 659, 664 (1942) (judge had authority to vacate his initial order granting a motion for new trial, post-jury conviction).

This firmly rooted state law establishing that judges are empowered to reconsider their decisions means that legal rulings–such as grants of directed verdicts–do not have the effect of acquittals while the original jury remains impaneled.

### C. This Court's rulings are consistent with the proposition that legal rulings alone–including grants of directed verdicts–do not function as acquittals for purposes of the Double Jeopardy Clause.

#### *i. Rulings made after jury discharge have the effect of acquittals.*

This Court's decisions, in which it found that the Double Jeopardy Clause barred second proceedings after a trial judge or an appellate court ruled that the evidence was insufficient to submit to a jury, demonstrate that such legal rulings have the effect of an acquittal only once the jury is discharged. This Court



has accorded the following scenarios similar deference as that owed a jury's not guilty verdict: (1) a trial judge's entry of an acquittal after the jury, which has failed to reach a verdict, is discharged, *United States* v. *Martin Linen Supply*, 430 U.S. at 575; (2) an appellate court's reversal of a jury's conviction based on insufficiency of the evidence, *Burks* v. *United States*, 437 U.S. at 17-18, and *Greene* v. *Massey*, 437 U.S. 19, 24-25 (1978); (3) a trial judge's grant, after a jury conviction, of a motion for new trial based on an assessment that the evidence was insufficient, *Hudson* v. *Louisiana*, 450 U.S. 40, 43 (1981); and (4) a trial judge's determination, when acting as the factfinder at a bench trial, that the evidence is insufficient, *Smalis* v. *Pennsylvania*, 476 U.S. at 141, 144-45.

In each of these scenarios, the jury could not function as the factfinder, either because it had been discharged when the judge issued the ruling on the sufficiency of the evidence, it was discharged after the ruling was made and the ruling was operative at that time, or the defendant had waived his right to a jury, making the judge the factfinder. Thus, the judges' rulings in each of these cases had the effect of acquittals. By contrast, when a judge, mid-jury trial, grants a motion for directed verdict, the jury remains the only and ultimate factfinder until it is discharged.

#### *ii. Legal rulings that do not affect a factfinder's ability to weigh the evidence are not acquittals.*

Where, as here, judges' legal rulings did not have the effect of acquittals, this Court has ruled that the Double Jeopardy Clause did *not* forbid second proceedings. For example, a trial judge's mid-trial legal ruling dismissing charges based on pre-indictment delay presented no bar to an appeal because it was a legal ruling unrelated to the strength of the prosecution's evidence. *United States* v. *Scott*, 437 U.S. at 98-99. Similarly, appeal of a trial judge's mid-trial grant of a defendant's motion to

dismiss an indictment for failure to state an offense was not barred because the mistrial was based upon a legal ruling unrelated to the strength of the evidence. *Lee* v. *United States*, 432 U.S. at 30-31; *see also Lockhart* v. *Nelson*, 488 U.S. 33, 40 (1988) (second trial permissible after appellate court holds that trial court committed legal error in admitting certain evidence at trial, even though the prosecution's evidence would be rendered insufficient by the exclusion of such evidence, because appellate court's threshold determination is legal ruling unrelated to the strength of the evidence).

Finally, it bears mentioning that this Court has held that even a factual determination by an appellate court that prompted it to overturn a conviction did not bar a second trial. In *Tibbs* v. *Florida*, the Court held that the Double Jeopardy Clause did not bar retrial after a state appellate court reversed a conviction on the ground that the conviction was against "the weight of the evidence." 457 U.S. at 42-45. In contrast to an appellate court's holding that the evidence was legally insufficient, a holding that a guilty verdict is against the weight of the evidence "does not mean that acquittal was the only proper verdict." *Id.* at 42. In other words, like the trial judge's ruling on the motion for directed verdict in this case, the appellate court's holding in *Tibbs* did not have the effect of definitively resolving the factual dispute in the case. The Double Jeopardy Clause therefore presented no bar to a second trial.

### D. This Court's decisions in bench trial cases are not to the contrary.

The cases that Smith cites to this Court concerning bench trials do not detract from the soundness of a conclusion that a trial judge presiding over a jury trial may reconsider legal rulings made while the jury is impaneled and sworn. Bench trials present a distinct, difficult issue not present in the jury-trial context. In a bench trial, both the factfinding and law-giving functions "are



combined in the judge, and a general finding of 'not guilty' may rest either on the determination of facts in favor of a defendant or on a resolution of a legal question favorably to him." *United States* v. *Jenkins*, 420 U.S. at 366-67, *overruled on other grounds*, *United States* v. *Scott*, 437 U.S. at 87-88. The inherent difficulty in separating a judge's dual roles in a bench trial has caused this Court to treat some legal rulings as if they were factual determinations for double jeopardy purposes. This doctrine, however, has no applicability in a jury trial.

For example, in *Smalis* v. *Pennsylvania*, the trial judge at a bench trial entered an order that, "[a]s the trier of fact and law," he found the evidence to be insufficient. 476 U.S. at 141. A decision by an appellate court reversing this determination, even if labeled as a legal decision, would effectively be an order to the factfinder to reconsider his factual determination. Such factual oversight implicates double jeopardy concerns, and this Court found as much. *Id.* at 145 (citing *Arizona* v. *Rumsey*, 467 U.S. 203, 211-12 (1984)); *see Price* v. *Vincent*, 538 U.S. at 640 (not only final judgment, but also an appeal raised the double jeopardy spectre).

Jeopardy attaches at a bench trial when the court begins to receive evidence. *Serfass* v. *United States*, 420 U.S. at 388. After the trial judge makes a determination that the evidence is insufficient "as the trier of fact," a determination by the appellate court that the evidence was sufficient would necessarily result in "further proceedings" before the trial judge to resolve the factual issues. In the bench trial context, receipt of such further evidence indeed would constitute a second jeopardy.

As such, this Court's admonition against "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged," *United States* v. *Jenkins*, 420 U.S. at 370, can be understood only in the context of a bench trial. *Smalis* v. *Pennsylvania*, 476 U.S. at 141, 146 (bench trial); *United States* v. *Jenkins*, 420 U.S. at 370 (bench trial); *see United States* v. *Martin Linen Supply*, 430 U.S. at 570,

575-76 (trial judge effectively acted as factfinder at bench trial by acquitting defendant after jury discharged due to mistrial). Because jeopardy attaches in a bench trial when the court begins to receive evidence, review of a trial judge's actual determination of the facts in the defendant's favor would result in a second jeopardy. In context, the phrase "further proceedings," along with the fact that the germane traditional protection afforded by the Double Jeopardy Clause is against second determinations of the facts, does not mean that a trial judge is precluded from reversing her own legal ruling in the midst of a trial by jury.

## III. The Policies Underlying The Double Jeopardy Clause Support A Trial Judge's Authority To Reconsider A Ruling, Made Mid-Jury Trial, Granting A Motion For Directed Verdict.

### A. Double jeopardy policies support this understanding of what constitutes an acquittal.

Sound policy considerations concerning the interests of both criminal defendants and the public good support this understanding of what constitutes an acquittal for purposes of the Double Jeopardy Clause. None of the bedrock double jeopardy principles–the value of retaining a chosen jury, the respect for final judgments, and the protection against second trials–is offended when a trial judge corrects an erroneous legal decision to remove a charge from the jury's consideration before that jury is discharged from its duty as the finder of fact. No second trial occurs when a trial judge, as in this case, reconsiders a mid-trial legal determination and ultimately submits the charge to the first and only jury impaneled and sworn to determine the facts: the defendant has been placed in jeopardy only once. *See Crist* v. *Bretz*, 437 U.S. at 35 (jeopardy attaches when jury sworn); *Green* v. *United States*, 355 U.S. at 191 (jeopardy terminates when jury discharged). And, the defendant's "valued right to have his trial



completed by a particular tribunal" is fully honored. *Wade* v. *Hunter*, 336 U.S. at 689.

Further, allowing a trial judge to reconsider a legal ruling and submit the charge to the first and only jury sworn to weigh the facts "is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the defendant by affording him an opportunity to 'obtai[n] a fair []adjudication of his guilt free from error.'" *Lockhart* v. *Nelson*, 488 U.S. at 42 (in the context of permitting retrial after appellate court's reversal for legal error, which rendered evidence at trial insufficient) (quoting *Burks* v. *United States*, 437 U.S. at 15). Correction of such a legal error after the close of the prosecution's case (and each such reconsideration is a legal correction because it is by nature a legal ruling) does not permit the government to "hone" an insufficient case. Where such a ruling is not a final determination based on a resolution of the facts adduced by the prosecution, and where the evidence is sufficient to send the charge to the finder of fact, permitting reconsideration is fully consonant with double jeopardy principles.

Additionally, in this context, the final judgment entitled to value is the jury's determination of guilt or innocence, based upon its resolution of the facts presented at trial. The jury is the finder of fact committed to weighing and resolving the facts as to the elements of the offense charged. Permitting a trial judge's reconsideration of a legal ruling up until that finder of fact is discharged ensures that "each defendant shall be subject to a just judgment on the merits of his case." *United States* v. *Scott*, 437 U.S. at 101.

As shown by the facts of this case, trial judges are often called upon to render these legal decisions quickly, without the ability to devote considerable thought to what may be a complex

matter.[9] Certainly, "an acquittal on the merits bars retrial even if based on legal error." *Arizona* v. *Rumsey*, 467 U.S. at 211. That fact, along with the time constraints that necessarily adhere to any assessment of the legal merits of a non-constitutionally mandated motion for required finding of not guilty, militates in favor of providing a trial judge with broad discretion to reconsider granting such a motion in order to correct a legal error up until the jury is discharged. The Double Jeopardy Clause's drastic remedy should not be invoked where, as here, there has been no "'abuse' of the trial process resulting in prejudice to the accused, by way of harassment or the like, such as to outweigh society's interest in the punishment of crime." *United States* v. *Jorn*, 400 U.S. 470, 492 (1971) (Stewart, J., dissenting).

Finally, precluding reconsideration of such legal rulings and effectively mandating that the granting of such motions amounts to a "magic open sesame," *Fong Foo* v. *United States*, 369 U.S. 141, 144 (1962) (Clark, J., dissenting), would injure the public good by inappropriately putting outside the reach of the law those criminal defendants against whom the evidence is sufficient to be considered by a jury. Such an approach violates the corresponding value under double jeopardy jurisprudence permitting the government "one full and fair opportunity to convict those who have violated its laws." *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984) (citing *Arizona* v. *Washington*, 434 U.S. at 509). Indeed, a rule that reconsideration of a legal ruling is not available when the evidence is in fact sufficient would be a "wooden interpretation [that] would distort the purposes of the constitutional provision to the prejudice of society's legitimate interest in convicting the guilty." *Green* v. *United States*, 355 U.S. at 204-05 (Frankfurter, J., dissenting).

---

[9]Under Massachusetts Rule of Criminal Procedure 25, the trial judge did not have the authority to reserve judgment on the motion: she was required to decide it immediately.



### B. A rule precluding reconsideration might remove the motion for directed verdict as a protection available to criminal defendants.

Unlike the defendant's valued right to have his case submitted to his particular tribunal, a motion for required finding of not guilty is not constitutionally mandated. It is a tool that states, and the federal government, choose to provide to defendants, and which gives defendants an additional chance at obtaining an acquittal with no potential downside. *See Galloway* v. *United States*, 319 U.S. 372, 403 (1943) (Black, J., dissenting) (in civil cases, "[u]nder the directed verdict practice, the moving party takes no such chance, for if his motion is denied, instead of suffering a directed verdict against him, his case merely continues into the hands of the jury."). If the trial judge denies the motion, or reconsiders an order allowing it, the defendant retains his valued right to submit the case to his particular tribunal, the sworn jury, with the possibility that the finder of fact will render a judgment of acquittal. *Cf. United States* v. *Jorn*, 400 U.S. at 484 (re-prosecution after successful appeal has not deprived defendant "of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal").

If a trial judge's initial grant of a motion for required finding is deemed to be an "acquittal" for double jeopardy purposes, however, this may present a threat to the continued practical use of such motions as part of a criminal defendant's arsenal of protections. A trial judge may very well be reluctant to grant such a motion where a possible legal mistake, as occurred in this case, will incorrectly take the defendant outside the reach of the law. This Court observed, in the context of mistrial motions, that if the rule were that the Double Jeopardy Clause barred a retrial whenever a judge granted a defendant's request for a mistrial, "the judge presiding over the first trial might well be more loath to grant a defendant's motion for mistrial." *Oregon* v. *Kennedy*, 456 U.S. 667, 676 (1982). Likewise, in *Tibbs* v.

*Florida*, this Court stated that holding the Double Jeopardy Clause bars retrial after a state appellate court reverses a conviction on the ground that the conviction was against the weight of the evidence "might prompt state legislatures simply to forbid [appellate] courts to reweigh the evidence" and "might also lead to restrictions on the authority of trial judges to order new trials based on their independent assessment of evidentiary weight." 457 U.S. at 45 n.22.

The same concern is present with respect to motions for directed verdicts. The rule advocated by Smith might effectively thwart the very purpose that motions for directed verdict are intended to serve: to cull from juries those charges that are insufficient as a matter of law.

### C. The Due Process Clause, not the Double Jeopardy Clause, is implicated by a defendant's contention that he suffered prejudice due to a judge's reconsideration of a legal ruling.

A defendant's experience of being tried for an offense necessarily is fraught with anxiety and uncertainty. The Double Jeopardy Clause, however, does not protect criminal defendants from all such unpleasant feelings. It protects only a defendant's settled expectations concerning final judgments that have resolved the facts of charged offenses in his favor. The fact that a trial judge's reconsideration of a legal ruling may change the landscape of the trial, even dramatically, is no different from numerous crucial rulings the court might make in the trial process.

To be sure, the judge's reconsideration of her legal order granting a motion for required finding may unfairly prejudice the defendant under certain circumstances. Such prejudice, however, is a variety of legal error that falls within the rubric of due process, not within that of governmental oppression prohibited by



the Double Jeopardy Clause. *Cf. Green* v. *United States*, 355 U.S. at 215 (Frankfurter, J., dissenting) (interpretation of Due Process Clause requires courts "to weigh considerations generated by changing concepts as to minimum standards of fairness"). Such due process prejudice can be corrected when necessary by the remedy of a new trial. *See United States* v. *Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 268 (1982) (in absence of double jeopardy violation, providing new trial "free of prejudicial error" adequate to vindicate accused's constitutional rights). Because the judge's legal ruling allowing a motion for directed verdict made during a jury trial does not constitute an acquittal, there is no reason to remove the defendant from the reach of the criminal laws and thereby thwart the public's interest in one full and fair opportunity to convict a person who has violated those laws.

## IV. Smith's Conviction Of Unlawful Possession Of A Firearm By The First And Only Jury Impaneled And Sworn Did Not Violate The Double Jeopardy Clause.

Applying the above principles to the facts of this case, Smith's conviction for unlawful possession of a firearm did not violate the Double Jeopardy Clause. Smith filed a motion for a required finding of not guilty under Massachusetts Rule of Criminal Procedure 25, which is a codification of the common law motion for directed verdict. *See* MASS. R. CRIM. P. 25, Reporter's Notes (rule "does not presume to alter practice as it has developed relative to the directed verdict"). The trial judge initially granted Smith's motion for required finding based upon an erroneous understanding of the applicable law. Because Smith argued that the prosecution must provide direct evidence of the length of the gun barrel, and did not cite the Supreme Judicial Court's decision that circumstantial evidence (as was undisputedly presented here) would suffice, the trial judge

incorrectly granted the motion.[10] The prosecution's evidence concerning the length of the gun barrel Smith used to shoot Christopher Robinson was sufficient as a matter of Massachusetts law to send the charge to the jury. Robinson testified quite plainly that Smith shot him with "[a] pistol," "a revolver," "a .32 or a .38." J.A. 12, 13, 14, 16-17.[11]

---

[10]As noted, under MASS. R. CRIM. P. 25, the trial judge did not have the authority to reserve judgment on the motion; she was required to decide it immediately. *See infra*, page 22 n.9. Despite this requirement that the motion be decided immediately, the trial judge's lengthy discussions with counsel in reconsidering her initial decision demonstrate that the legal question was one that required some thought and reflection. J.A. 20-22, 71-74, 81-89.

In fact, acknowledging that the legal question might require further thought, the prosecutor, during this reconsideration hearing, specifically suggested that the judge submit the charge to the jury and, in the event of a conviction, grant the motion for required finding at that point if she ultimately determined that the law required it. J.A. 74. The trial judge agreed with that approach, but before the jury's conviction, denied the motion for required finding. J.A. 92.

[11]Smith makes a point of noting that the trial judge, in initially granting his motion for a required finding, stated that there was not a "scintilla" of evidence to support proof of the gun barrel's length. *See* Br. for Pet'r, page i. Read, however, in the context of both the discussions that the judge had with counsel and the basis of the motion for required finding (*i.e.*, that direct, as opposed to indirect, evidence of the gun barrel's length needed to be adduced by the Commonwealth), it is plain that she was referring to the absence of direct evidence of gun-barrel length, not a complete absence of evidence on an element of the crime. The judge herself confirmed this during the discussion which led to her reconsideration. In discussing *Commonwealth* v. *Sperrazza*, 372 Mass. 667, 363 N.E.2d 673 (1977), the judge stated: "[t]he long and short of [*Sperrazza*] is that . . . the Commonwealth doesn't have to put in any evidence. The jury can infer the length of it based upon the type of instrument." J.A. 72. Although she again used a phrase that could be construed as meaning a complete absence of evidence as to an element, she then tied it back to the ruling of *Sperrazza*, which states that indirect evidence of gun-barrel length, that is, through testimony concerning "the type of



As discussed earlier, under Massachusetts common law it is well established that trial judges possess the authority to reconsider decisions made during the pendency of a proceeding. *See Commonwealth* v. *Haskell*, 438 Mass. at 792, 784 N.E.2d at 628; *Fine* v. *Commonwealth*, 312 Mass. at 258-60, 44 N.E.2d at 663-64. The trial judge, upon her realization that she made a legal error in granting the motion, exercised that authority, withdrew the ruling, and permitted the sole factfinder, *i.e.*, the jury, to do its work. As the Massachusetts Appeals Court found, because the trial judge simply reconsidered her legal ruling granting the motion for required finding, there was no second proceeding necessary. J.A. 125.

Indeed, none of the participants at Smith's trial found the judge's exercise of her common-law power of reconsideration at all remarkable. The record is bereft of any discussion or concern that the trial judge did not have the power to reconsider her legal ruling. Certainly neither the prosecutor nor Smith's counsel believed that the judge's rulings were final, as both argued for reconsideration: the prosecutor argued, successfully, for the judge's reconsideration of her ruling allowing the motion; and Smith's counsel argued, unsuccessfully, for reconsideration of her subsequent ruling denying the motion for required finding. Not one person who had a role to play in considering, arguing, or ruling on Smith's motion for required finding believed that the trial judge's rulings could not be reconsidered. This is entirely understandable given well-established Massachusetts law.[12]

---

instrument" used, will suffice. 372 Mass. at 670, 363 N.E.2d at 675.

[12]As such, one cannot attach any particular significance to the facts that the trial judge's three separate decisions were marked on the face of the motion (the first two marked by the clerk and the last marked by the judge herself) and that all three decisions ultimately were entered on the docket. In any event, both procedures are routine matters of practice in the Massachusetts courts; a review of the docket in this case demonstrates the practice that each

Accordingly, the trial judge never "acquitted" Smith for double jeopardy purposes. Instead, at the point that Smith's motion for required finding was erroneously allowed as a matter of law, "[h]e was . . . neither acquitted nor convicted, because he himself successfully undertook to persuade the trial court not to submit the issue of guilt or innocence to the jury which had been impaneled to try him." *See United States* v. *Scott*, 437 U.S. at 99.

Further, all the policies underlying the Double Jeopardy Clause were served in this case. Melvin Smith was not "'deprived' of his valued right to go to the first jury." *Id.* at 100. One jury was sworn, one jury deliberated as to the facts, and one jury returned a verdict of guilty. Smith was subjected to one jeopardy, and that jeopardy terminated after the jury was discharged. As such, it cannot be said that Smith was "worn down" by the prosecution's presentation of its case to only one jury.

The trial judge's own reversal of her purely legal ruling that the evidence was insufficient, which was based upon a misunderstanding of the legal principles at issue, did not implicate the double jeopardy concern of a second trial. *Cf. Lockhart* v. *Nelson*, 488 U.S. at 40 (no double jeopardy bar to retrial on appellate court's reversal based upon legal error, which error rendered the evidence insufficient at the first trial). At that point, the "'criminal proceedings against [Smith had] not run their full course,'" *see Justices of the Boston Mun. Ct.* v. *Lydon*, 466 U.S. 294, 308 (1984) (quoting *Price* v. *Georgia*, 398 U.S. 323, 326 (1970)), and Smith's jeopardy continued as to his indictment for unlawful possession of a firearm. The public's interest in punishing those who violate its laws was vindicated by presenting a factually sufficient case to the jury originally impaneled and sworn to decide the matter.

---

action taken in a matter is reflected on the docket. J.A. 1-8.



Finally, there are no due process prejudice concerns presented by this case. Upon the judge's correction of her legal error, Smith himself did not demonstrate a belief that his right not to be placed twice in jeopardy was violated, as he neither objected to the trial judge's decision to submit the charge to the jury nor requested that the case be re-opened in order that he might introduce evidence.[13] At no point did he make a demonstration of how his trial strategy would have been any different had the judge not made her initial ruling.[14] As a result, the case

---

[13]Smith did not present to the Supreme Judicial Court his complaint about the Appeals Court's statement that he was given an "opportunity to reopen" his case. *See* Br. for Pet'r, page 34. He also neglected to present it in his certiorari petition. As such, it is not a matter for which this Court granted certiorari. *See Youakim* v. *Miller*, 425 U.S. at 234; SUP. CT. R. 14.1(a) ("[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court"). In any event, the record demonstrates the far more salient fact about this portion of the trial: Smith himself accepted the judge's reconsideration without question or comment, never asking to present evidence in light of the judge's reconsideration of her ruling. Indeed, the trial judge made it clear that she would have allowed the defendant to reopen his case had he so requested. J.A. 109.

[14]Because Smith never presented to the Massachusetts Appeals Court his current claim that his strategy in presenting evidence at trial might have been different had the judge not initially allowed his motion for required finding, it should not be considered here. *Compare* J.A. 114-19 *with* Br. for Pet'r, pages 35-37.

Smith also did not present to the Massachusetts Supreme Judicial Court the argument, made for the first time in his brief here, that the Appeals Court conducted an improper "prejudice" analysis of his double jeopardy claim. *See* Br. for Pet'r, pages 32-37. Neither did he make this argument in his certiorari petition. Accordingly, that legal issue is not one that is properly contained within the question presented for the Court's decision in this case. *Youakim* v. *Miller*, 425 U.S. at 234; SUP. CT. R. 14.1(a). In any event, the Appeals Court's prejudice analysis properly focused only on whether Smith was entitled to a new trial concerning his state-law argument that reconsideration of the ruling violated MASS. R. CRIM. P. 25. *See* J.A. 125-27.

proceeded as if the trial judge had correctly denied the motion at the outset. This Court's admonition, made in an analogous context regarding correction of legal errors, applies here: Smith had "'no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.'" J.A. 125 (quoting *United States* v. *Wilson*, 420 U.S. at 345). The Massachusetts Appeals Court's decision affirming Smith's conviction of unlawful possession of a firearm should be affirmed.

## CONCLUSION

For the reasons stated above, Massachusetts requests that this Court affirm the judgment of the Massachusetts Appeals Court.

Respectfully submitted,

THOMAS F. REILLY
*Attorney General of Massachusetts*

CATHRYN A. NEAVES*
*Assistant Attorney General*
DEAN A. MAZZONE
*Special Assistant Attorney General*
DAVID M. LIEBER
*Assistant Attorney General*
JOSEPH M. DITKOFF
*Special Assistant Attorney General*
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

**Counsel of Record*

November, 2004

No. 03-8661

In The

# Supreme Court of the United States

MELVIN T. SMITH,

*Petitioner,*

v.

COMMONWEALTH OF MASSACHUSETTS,

*Respondent.*

**On Writ Of Certiorari To The Appeals Court Of The Commonwealth Of Massachusetts**

## REPLY BRIEF FOR PETITIONER

DAVID NATHANSON
COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 Bromfield Street
Boston, MA 02108
617-482-6212

*Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS


Page

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... iii

ARGUMENT ..... 1

I. The trial judge's entry of a "Required Finding of Not Guilty" constituted an acquittal of Smith ..... 2

A. A "Required Finding of Not Guilty" constitutes a resolution of some or all of the elements of the offense ..... 2

B. An acquittal entered by a trial judge carries the same force as an acquittal by a jury ..... 4

C. An acquittal based on the prosecution's failure to present sufficient evidence as a matter of law carries the same weight as a jury's verdict of not guilty ..... 6

II. The state's proposal that jeopardy should terminate only upon discharge of the jury is wrong as a matter of law and is a slippery slope into trial-level chaos and appellate confusion ..... 7

III. A judge's supposed "inherent authority" to reconsider interlocutory rulings does not trump the Constitution's limitation against placing defendants twice in jeopardy for the same offense ..... 10

IV. The double jeopardy protection claimed by Smith is his right to respite from further prosecution after acquittal, not his "valued right to a particular tribunal." ..... 12




TABLE OF CONTENTS – Continued


Page

V. A ruling in favor of Smith's double jeopardy claim works no change upon state procedures allowing defendants to move for an acquittal at the close of the prosecution's evidence ..... 13

VI. Considerations of prejudice and reliance are simply not cognizable in claims of Double Jeopardy ..... 16

CONCLUSION ..... 17

TABLE OF AUTHORITIES

Page

FEDERAL CASES

*Arizona v. Rumsey*, 467 U.S. 203 (1984) ..... 5, 7

*Arizona v. Washington*, 434 U.S. 497 (1978) ..... 12

*Benton v. Maryland*, 395 U.S. 784 (1969) ..... 11, 17

*Brock v. North Carolina*, 344 U.S. 424 (1953) ..... 12

*Carlisle v. United States*, 517 U.S. 416 (1996) ..... 11

*Crist v. Bretz*, 437 U.S. 28 (1978) ..... 11

*Degen v. United States*, 517 U.S. 820 (1996) ..... 12

*Ex Parte Lange*, 85 U.S. 163 (1873) ..... 2, 4

*Fong Foo v. United States*, 369 U.S. 141 (1962) ..... 4, 5, 9

*Hudson v. Louisiana*, 450 U.S. 40 (1981) ..... 5, 11

*In re United States*, 286 F.2d 556 (1st Cir. 1961), *overruled sub nom. Fong Foo v. United States*, 369 U.S. 141 (1962) ..... 9

*Jackson v. Virginia*, 443 U.S. 307 (1979) ..... 14

*Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984) ..... 8

*Kepner v. United States*, 195 U.S. 100 (1904) ..... 13

*Mallard v. United States Dist. Court for Southern Dist.*, 490 U.S. 296 (1989) ..... 11

*Morris v. Matthews*, 475 U.S. 237 (1986) ..... 17

*Oregon v. Kennedy*, 456 U.S. 667 (1982) ..... 13

*Price v. Georgia*, 398 U.S. 323 (1970) ..... 17

*Sanabria v. United States*, 437 U.S. 54 (1978) ..... 1, 3, 5, 6, 9

*Smalis v. Pennsylvania*, 476 U.S. 140 (1986) ..... *passim*



TABLE OF AUTHORITIES – Continued

Page

*Tibbs v. Florida*, 457 U.S. 31 (1982) ..... 10

*United States v. Ball*, 163 U.S. 662 (1896) ..... 13

*United States v. Certified Grocers Co-op*, 546 F.2d 1308 (7th Cir. 1976) ..... 7

*United States v. DiFrancesco*, 449 U.S. 117 (1980) ..... 10

*United States v. Dyer*, 546 F.2d 1313 (7th Cir. 1976) ..... 7

*United States v. Ellison*, 722 F.2d 595 (10th Cir. 1982) ..... 8, 9

*United States v. Jorn*, 400 U.S. 470 (1971) ..... 16

*United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) ..... 1, 2, 3, 5

*United States v. Sanges*, 144 U.S. 310 (1892) ..... 2

*United States v. Scott*, 437 U.S. 82 (1978) ..... 2, 3, 13

*United States v. Sutton*, 732 F.2d 1483 (10th Cir. 1984) ..... 9

*Will v. United States*, 389 U.S. 90 (1967) ..... 9

STATE CASES

*Bradford v. Knights*, 427 Mass. 748, 695 N.E.2d 1068 (1998) ..... 10

*Commonwealth v. Downs*, 31 Mass. App. Ct. 467, 579 N.E.2d 679 (1991) ..... 10

*Commonwealth v. Haskell*, 438 Mass. 790, 784 N.E.2d 625 (2003) ..... 10

*Ex parte Bishop*, No. CR-02-2295 (Ala. Crim. App. 2003) ..... 15

*People v. Henry*, 789 N.E.2d 274 (Ill. 2003) ..... 15

TABLE OF AUTHORITIES – Continued

Page

*People v. Waggoner*, 196 Colo. 578 (Colo. 1979) ..... 15

*State ex rel. Yates v. Court of Appeals*, 512 N.E.2d 343 (Ohio 1987) ..... 15

*State v. Blacknall*, 672 A.2d 1170 (N.J. Super. App. Div. 1995), *affirmed*, 143 N.J. 419 (N.J. 1996) ..... 15

*State v. Gurske*, 395 N.W.2d 353 (Minn. 1986) ..... 15

*State v. Jackson*, 857 P.2d 267 (Utah Ct. App. 1993) ..... 15

*State v. Lee*, 982 P.2d 340 (Haw. 1999) ..... 15

*State v. Millanes*, 885 P.2d 106 (Ariz. Ct. App. 1994) ..... 15

CASES FROM OTHER COUNTRIES

*Ireland's Case*, 7 How. St. Tr. 79 (1678) ..... 12

*Whitebread's Case*, 7 How. St. Tr. 311 (1679) ..... 12

CONSTITUTION

U.S. Const. amend. V ..... 1, 11, 12

FEDERAL RULES

Fed. R. Crim. P. 29 ..... 5

Mass. R. Crim. P. 25(a) ..... 11, 15

OTHER AUTHORITIES

2 M. Hale, Pleas of the Crown (1847) ..... 12

Friedland, Double Jeopardy (1969) ..... 12



## ARGUMENT

Our Constitution does not contemplate second-class acquittals. One is either acquitted of an offense or one is not. Yet, the state and amici curiae in support of the respondent state would have this Court make exceptions to this common sense rule. For example, they would remove certain acquittals from the reach of the Fifth Amendment's Double Jeopardy Clause by distinguishing between acquittals by a judge and acquittals by a jury[1] and by distinguishing between "legal" acquittals and "factual" acquittals.[2] This court has repeatedly rejected such nice (and artificial) distinctions.[3] As such, the state asks this court to depart from the settled law of the Double Jeopardy Clause.

The state and amici curiae supporting the state would have the Court parse the Double Jeopardy Clause and its jurisprudence as finely as possible in order to enhance the state's ability to convict. But that is not the proper way to read the Double Jeopardy Clause. As this Court explained one hundred and thirty-one years ago in *Ex Parte Lange*:

> There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should

---

[1] Resp. Br. at 13-14; United States Br. at 10-17.

[2] Resp. Br. at 17-20.

[3] *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977)); *Sanabria v. United States*, 437 U.S. 54, 77 (1978); *Smalis v. Pennsylvania*, 476 U.S. 140, 144 (1986).

> be given to the words of the fundamental law in which they are embodied.[4]

The reason for this construction lies in the recognition that

> [t]he common law maxim [*nemo debet bis vexari pro una et eadem causa*], and the Constitution are founded in the humanity of the law, and in a jealous watchfulness over the rights of the citizen, when brought in unequal contest with the State.[5]

Smith, brought into an unequal contest with the state, was acquitted by a competent tribunal. That basic fact cannot be disguised by the state's overly narrow interpretations of precedent. "Not guilty" means not guilty.

## I. The trial judge's entry of a "Required Finding of Not Guilty" constituted an acquittal of Smith

### A. A "Required Finding of Not Guilty" constitutes a resolution of some or all of the elements of the offense.

The state argues that the judge's order could not have been a "resolution, correct or not, of some or all of the factual elements of the offense"[6] because the trial judge "does not have the authority to resolve the facts."[7] But this Court stated in *United States v. Scott, United States v. Martin Linen*, and *Smalis v. Pennsylvania* that

[4] *Ex Parte Lange*, 85 U.S. 163, 178 (1873).

[5] *United States v. Sanges*, 144 U.S. 310, 315 (1892) (*quoting State v. Jones*, 7 Ga. 422, 422-425 (Ga. 1849)).

[6] *Martin Linen*, 430 U.S. at 571.

[7] Resp. Brief at 13; *see id.* at 25.



the granting of a motion for acquittal at the close of the prosecution's case is indeed a resolution of the factual elements of the offense, and constitutes an acquittal.[8] Thus, the state's argument to the contrary ignores controlling precedent.

The argument also relies on a distortion of the standard that the trial judge applied when she decided Smith's motion for acquittal. The state argues that a trial judge deciding a motion for acquittal has no authority to "resolve" conflicting facts, and therefore no judge can ever enter a binding judgment on a motion for acquittal.[9] But the limitation on resolving conflicting evidence does not bar the judge from making the resolution of the factual elements that is necessary when ruling on a motion for acquittal. Indeed, the state's argument was foreclosed long ago in *Martin Linen*, where this court held that

> [s]uch a limitation on the role of a trial judge, [i.e., the inability to weigh credibility on a motion for acquittal] however, has never inhibited his ruling in favor of a criminal defendant. *Fong Foo v. United States*, 369 U.S. 141 (1962), establishing the binding nature of a directed verdict, is dispositive on that point.[10]

The resolution that this Court speaks of in the relevant cases is not a resolution of the conflicting facts, but a resolution of the "factual *elements*" of the offense.[11] The

[8] *Sanabria*, 437 U.S. at 71-72; *United States v. Scott*, 437 U.S. 82, 91, 97 (1978); *Smalis*, 476 U.S. at 144.

[9] Resp. Br. at 13.

[10] *Martin Linen*, 430 U.S. at 573.

[11] *Martin Linen*, 430 U.S. at 571 (emphasis added).

trial judge did not resolve *facts* in Smith's case. She resolved the question of whether the evidence could meet the elements of the offense. She evaluated the states' case in the light most favorable to the prosecution[12] and – correctly or not – ruled that the evidence introduced by the state failed to establish an essential element of the offense.[13] That is an acquittal.

Finally, even if the court did not have the power to enter an acquittal, the acquittal is still final and preclusive because the Court had jurisdiction over the defendant and the offense.[14]

### B. An acquittal entered by a trial judge carries the same force as an acquittal by a jury.

The state would have this Court distinguish between acquittals entered by a judge and those returned by a jury.[15] Indeed, the state argues that the long-established prohibition against "'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged,' can *only* be understood only in the context of a bench trial."[16] This Court's consistent precedent foreclosed this argument decades ago.

An acquittal by a judge carries the exact same consequence as an acquittal returned by a jury: jeopardy

[12] J.A. 21.

[13] J.A. 21, 22.

[14] *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); *Ex Parte Lange*, 85 U.S. at 174.

[15] Resp. Br. at 18-19.

[16] Resp. Br. at 19 (*quoting Jenkins*, 420 U.S. at 370) (emphasis added).



terminates.[17] In *Martin Linen* (a case involving a jury trial), this Court declared that there is "no 'legal distinction' between judge and jury with respect to the invocation of the protections of the Double Jeopardy Clause."[18] Thus, the state's argument is meritless.

The state attempts to distinguish *Smalis* by asserting that, because in that jury-waived case the trial judge also assumed the role of fact-finder, that judgment of acquittal was somehow different from the trial judge's ruling in Smith's case.[19] But the judge in *Smalis* did not resolve conflicting evidence in granting Smalis' demurrer. Rather, the trial judge in *Smalis* allowed the defendant's demurrer by applying the familiar directed verdict standard, which required drawing "all reasonable inferences which the Commonwealth's evidence tended to prove."[20]

Hence, both the judge in *Smalis* and the judge in Smith's case applied the directed verdict standard and found that the evidence viewed in the light most favorable to the prosecution was insufficient for any reasonable fact-finder to find guilt. The judge's ruling terminated jeopardy in *Smalis*. The trial judge's ruling in this case also terminated jeopardy, and for the same reasons.

[17] *Fong Foo*, 369 U.S. at 143; *Martin Linen*, 430 U.S. at 573; *Sanabria*, 437 U.S. at 64 and n.18; *Hudson v. Louisiana*, 450 U.S. 40, 44-45, n.5 (1981); *Arizona v. Rumsey*, 467 U.S. 203, 210-212 (1984); *Smalis*, 476 U.S. at 145.

[18] *Martin Linen*, 430 U.S. at 573.

[19] Resp. Br. at 19.

[20] *Smalis*, 476 U.S. at 142 and n.2.

### C. An acquittal based on the prosecution's failure to present sufficient evidence as a matter of law carries the same weight as a jury's verdict of not guilty.

The state argues that a motion for acquittal, granted because the prosecution's proof is insufficient as a matter of law, is merely a "legal ruling" and not an acquittal.[21] This Court's decision in *Sanabria* flatly rejected that argument:

> Unlike questions of whether an indictment states an offense, a statute is unconstitutional, or conduct set forth in an indictment violates the statute, what proof may be presented in support of a valid indictment and the sufficiency of that proof are not 'legal defenses'.[22]

As explained in *Smalis*, a defendant who makes a motion for acquittal seeks

> a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt. Our past decisions, which we are not inclined to reconsider at this time, hold that such a ruling is an acquittal under the Double Jeopardy Clause. See, *e.g. United States* v. *Martin Linen Supply Co.*, [430 U.S. 564 (1977)]; *Sanabria* v. *United States*, [437 U.S. 54 (1978)]. *United States* v. *Scott* does not overturn these precedents; indeed, it plainly indicates that the category of acquittals

[21] Resp. Br. at 16-18, 21.

[22] *Sanabria*, 437 U.S. at 77.



> includes "[judgments] . . . by the court that the evidence is insufficient to convict."[23]

Thus, the state's argument on this point is also meritless.

## II. The state's proposal that jeopardy should terminate only upon discharge of the jury is wrong as a matter of law and is a slippery slope into trial-level chaos and appellate confusion.

The state and amici curiae Idaho, et al., argue that, even upon a finding of insufficient evidence by the trial judge, jeopardy does not terminate until the factfinder (here, the jury) is discharged.[24] Amicus United States does not state when jeopardy terminates under its view. But it implicitly adopts the state's position, given the United States' remarkable argument that "*all* mid-trial rulings granting an acquittal – no matter how definitively expressed" are incapable of terminating jeopardy.[25] This proposition is incorrect as a matter of law because this Court found in *Smalis* that the Double Jeopardy Clause is violated when further proceedings follow an acquittal even when the trial can resume before the exact same factfinder.[26]

[23] *Smalis*, 476 U.S. at 144 (footnotes omitted) (*quoting Scott*, 437 U.S. at 91).

[24] Resp. Br. at 12-15; Idaho Br. at 5-8.

[25] United States Br. at 22 (emphasis in original).

[26] *Smalis*, 476 U.S. at 145; *Rumsey*, 467 U.S. at 211-12; *see Jenkins*, 420 U.S. at 369 n.13; *see also United States v. Dyer*, 546 F.2d 1313, 1316 (7th Cir. 1976); *United States v. Certified Grocers Co-op*, 546 F.2d 1308, 1312-1313 (7th Cir. 1976).

But also, the rule advocated by the state and amici curiae supporting the state would introduce chaos into intense, but otherwise orderly, trials. For example, under this theory, the judge would be permitted to reconsider an acquittal, re-instruct the jury, and submit the already-acquitted offense to the jury at any of the follow points in trial:

- at the close of the defense case, after it has presented evidence helpful to the defense on the remaining charges but damaging on the already-acquitted offense;
- during jury deliberations, immediately after the jury announces that it has reached a verdict on the remaining charges, or after it has returned with questions suggesting to the prosecutor that it is heading towards acquittal on the remaining charges;
- after the jury returns a not guilty verdict on one count but remains empanelled to consider additional charges; and
- after the jury announces a complete not guilty verdict, if the judge refuses to discharge them.[27]

Moreover, if it is only the discharge of the jury that makes an acquittal final, prosecutors could routinely petition appellate courts for writs of mandamus to prevent the formal discharge of the jury after granted motions for acquittal. (Indeed, in *United States v. Ellison*, the Tenth

[27] *See Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 320-21 (1984) (Brennan, J., concurring).



Circuit rejected en banc just such a mandamus petition[28] and this Court rejected the government's motion for an emergency stay.[29]) And it appears that the government pursued a similar unsuccessful strategy of asking for mandamus in *Fong Foo v. United States*.[30] Citing *Fong Foo*, this Court later noted its condemnation of the use of mandamus as a substitute for an appeal of an acquittal in *Will v. United States*.[31] But the state's theory, if accepted, presents an exception that will swallow the rule against double jeopardy.

In place of Double Jeopardy Clause analysis, the state and the United States argue that reconsideration of an acquittal should only be evaluated instead as a due process problem of detrimental reliance.[32] But the Double Jeopardy Clause is not so frail an instrument that its reach can be avoided by simply labeling its violation a "due process" problem.[33] This approach, besides being faithless to the Constitution, would be unwise as a matter of judicial policy. It asks the Court to allow trial judges free reign to allow prosecutorial requests to reconsider acquittals. And it asks this Court to create a new constitutional claim of error (detrimental reliance on an acquittal). As in the examples given above, that combination ensures that this new class of error will proliferate and engender otherwise unnecessary litigation.

[28] *United States v. Ellison*, 722 F.2d 595 (10th Cir. 1982).

[29] *United States v. Sutton*, 732 F.2d 1483, 1487 (10th Cir. 1984).

[30] *In re United States*, 286 F.2d 556, 563 (1st Cir. 1961), *overruled sub nom. Fong Foo v. United States*, 369 U.S. 141 (1962).

[31] *Will v. United States*, 389 U.S. 90, 96 (1967).

[32] Resp. Br. at 24-25; United States Br. at 27.

[33] *See Sanabria*, 437 U.S. at 72.

## III. A judge's supposed "inherent authority" to reconsider interlocutory rulings does not trump the Constitution's limitation against placing defendants twice in jeopardy for the same offense.

The state and amici curiae supporting the state argue that the trial judge had the inherent authority to reconsider her acquittal of Smith because judges, as a general matter, have the power to reconsider rulings.[31] But this general rule is irrelevant to double jeopardy analysis because "[a]n acquittal is accorded special weight"[35] and greater finality than ordinary judgments.

The Massachusetts Appeals Court cited *Commonwealth v. Haskell*,[36] as precedent for a judge's inherent authority to reconsider an acquittal.[37] The state additionally cites *Bradford v. Knights*[38] and *Commonwealth v. Downs*,[39] as authority. But *Haskell* and *Downs* deal with pre-trial motions to suppress,[40] and *Bradford* deals with a magistrate's pre-trial decision whether to issue a complaint.[41] *Smith* is the *only* Massachusetts case that has

[31] Resp. Br. at 15-16; United States Br. at 12-14.

[35] *United States v. DiFrancesco*, 449 U.S. 117, 128-130 (1980); *Tibbs v. Florida*, 457 U.S. 31, 41 and n.15 (1982).

[36] *Commonwealth v. Haskell*, 438 Mass. 790, 792, 784 N.E.2d 625 (2003).

[37] J.A. at 125; Resp. Br. at 15, 27.

[38] *Bradford v. Knights*, 427 Mass. 748, 752, 695 N.E.2d 1068, 1071 (1998).

[39] *Commonwealth v. Downs*, 31 Mass. App. Ct. 467, 469, 579 N.E.2d 679, 681 (1991).

[40] *Haskell*, 438 Mass. at 792, 784 N.E.2d at 627-28; *Downs*, 31 Mass. App. Ct. at 469, 579 N.E.2d at 681.

[41] *Bradford*, 427 Mass. at 752.



ever held that a judge has the authority to reconsider a verdict of not guilty.[42]

Amicus United States argues that the Double Jeopardy Clause must be interpreted in light of the "background rule" permitting reconsideration of all "mid-trial" rulings as a function of a judge's inherent authority.[43] The argument assumes the point at issue: whether a granted motion for acquittal represents the end of trial. Simply labeling the ruling to be "mid-trial" does not resolve anything.

The argument that the Double Jeopardy Clause must be interpreted with regard to this "background rule" is also backwards. Any rule generally permitting reconsideration must be read in light of the supremacy of the Constitution, and not the other way around. General uncodified policies of courtroom procedure cannot trump the constitutional right not to be placed twice in jeopardy for the same offense any more than a state statue or court rule can trump that right.[44] Rather, the specific injunctions of the Fifth Amendment, statutes, and even court rules – such as the requirement of an immediate ruling under Mass. R. Crim. P. 25(a) – all trump inherent authority.[45] Indeed, the invocation of inherent authority is disfavored

[42] J.A. 125-26.

[43] United States Br. at 22.

[44] *Benton v. Maryland*, 395 U.S. 784 (1969); *Hudson*, 450 U.S. at 44-45; *Smalis*, 476 U.S. at 144 n.5; *Crist v. Bretz*, 437 U.S. 28, 37 (1978).

[45] *Carlisle v. United States*, 517 U.S. 416, 431 (1996); *Mallard v. United States Dist. Court for Southern Dist.*, 490 U.S. 296, 308 n.8 (1989).

as a general matter, regardless of whether constitutional rights are involved.[46]

As such, saying that a judge has inherent authority to reconsider says nothing about what our Constitution requires. Under pre-1789 English common law, judges had the authority to discharge juries headed for acquittal, as in the infamous *Ireland's Case*.[47] But the Fifth Amendment represented a codification of the colonists' revolt against this oppressive practice.[48] Under our Constitution, a judge has no "inherent authority" to reconsider an acquittal.

## IV. The double jeopardy protection claimed by Smith is his right to respite from further prosecution after acquittal, not his "valued right to a particular tribunal."

The state and amici curiae supporting the state repeatedly attempt to characterize the right at issue in this case as Smith's "valued right to a particular tribunal."[49] Smith does not rely, and never has relied, on this aspect of the Double Jeopardy Clause. The "particular tribunal" analysis applies to cases dealing with mistrials declared without manifest necessity,[50] not acquittals on the

[46] *Degen v. United States*, 517 U.S. 820, 823 (1996).

[47] 2 M. Hale, Pleas of the Crown 294-295 (1847); *Ireland's Case*, 7 How. St. Tr. 79 (1678); *Whitebread's Case*, 7 How. St. Tr. 311 (1679)

[48] Friedland, Double Jeopardy 12, 13 (1969); *Brock v. North Carolina*, 344 U.S. 424, 442 (1953) (Douglas, J. dissenting).

[49] Resp. Br. at 12, 20, 23, 28; Idaho Br. at 8; United States Br. at 21.

[50] *Arizona v. Washington*, 434 U.S. 497, 505 (1978).



merits.[51] Instead, Smith relies on the absolute prohibition against further proceedings after an acquittal.[52]

Indeed, if the issue was simply a defendant's right to a particular tribunal, the government could justify the direct appeal of any acquittal if it could simply demonstrate manifest necessity for its appeal. But that is not the law.[53] The right to a particular tribunal, although valued, is simply not at issue in this case.

## V. A ruling in favor of Smith's double jeopardy claim works no change upon state procedures allowing defendants to move for an acquittal at the close of the prosecution's evidence.

The state and amici curiae supporting the state argue that accepting Smith's position would erode defendants' protection from deficient prosecutions. They claim it would (1) push trial judges toward denying or reserving motions for acquittal and (2) push states toward forbidding trial judges from granting motions for acquittal.[54] Smith regards the state's purported concerns for the protection of defendants with skepticism, given that the state seeks to withdraw binding force from all motions for acquittal.[55] But assuming the sincerity of the argument, the argument fails on the merits.

[51] *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982) (*citing Sc[illegible]*, 437 U.S. at 93).

[52] *United States v. Ball*, 163 U.S. 662, 671 (1896).

[53] *Kepner v. United States*, 195 U.S. 100, 126-130 (1904).

[54] Resp. Br. at 23; United States Br. at 28; Idaho Br. at 9-11.

[55] Resp. Br. at 12-15; Idaho Br. at 5-8; United States Br. at 22.

As to pushing trial judges toward denying motions for acquittal, erring on the side of denial is both proper and common practice. The standard for a motion for acquittal is whether *any* rational trier of fact could find guilt beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution.[56] The standard is designed to be easily satisfied because judges ought to be careful about pretermitting a prosecution, and they are. Judges in nearly every state see these motions in virtually every case tried before them. But they normally deny them because the standard for sufficiency is easily satisfied by well-prepared prosecutors.

Second, amici curiae United States and Idaho, et al., argue that judges hastily grant motions for acquittal because they do not want to delay trials and that judges should be allowed to reconsider those supposedly hasty decisions later in the trial.[57] The decision to grant a motion for acquittal does not happen so precipitously as the state would have it. Motions for acquittal are made at the close of the prosecution's case, a natural break in the trial. The jurors are often excused during discussion of these and other motions. There is no reason to think that, as a general matter, judges do anything other than handle these motions in a considered and careful way.

On the other hand, adopting the state's rule injects chaos into what is an otherwise well-understood and orderly procedure. Parties will have no idea what has been determined by the Court or when those determinations might change. Defendants will not know what charges to

[56] *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

[57] United States Br. at 23; Idaho Br. at 10.



defend against. Prosecutors will not be able to determine the bounds of relevant cross-examination. And judges would also be unfairly burdened. Particularly during the defense case, judges must listen to the evidence to determine whether the defendant is entitled to any number of jury instructions. With charges dropping out and then popping back in to the case, judges could easily (and understandably) miss the evidentiary foundation for instructions on charges later resurrected by reconsideration. That is no way to run a trial.

Amici curiae Idaho, et al., argue that states like Massachusetts that require an immediate ruling on sufficiency of the evidence[58] would be particularly burdened by adoption of Smith's position.[59] There would be no such burden. Of the eleven states identified by Idaho, four already prohibit reconsideration of an acquittal[60] and the caselaw of five others strongly suggests that they would prohibit reconsideration of an acquittal.[61] And because Fed. R. Crim. P. 29 explicitly permits reservation, there would be no particularly remarkable impact upon federal

[58] Mass. R. Crim. P. 25(a).

[59] Idaho Br. at 9-10.

[60] *State v. Millanes*, 885 P.2d 106, 110 (Ariz. Ct. App. 1994); *State v. Lee*, 982 P.2d 340, 345 (Haw. 1999); *People v. Henry*, 789 N.E.2d 274, 286 (Ill. 2003); *State v. Blacknall*, 672 A.2d 1170, 1173-76 (N.J. Super. App. Div. 1995), *affirmed*, 143 N.J. 419 (N.J. 1996).

[61] *See Ex parte Bishop*, No. CR-02-2295 (Ala. Crim. App. 2003) (released for publication August 17, 2004); *see People v. Waggoner*, 196 Colo. 578, 581 (Colo. 1979); *see State v. Gurske*, 395 N.W.2d 353, 356 (Minn. 1986); *see State ex rel. Yates v. Court of Appeals*, 512 N.E.2d 343 (Ohio 1987); *see State v. Jackson*, 857 P.2d 267, 269 (Utah Ct. App. 1993).

practice (as well as the practice of those states that permit reconsideration).

## VI. Considerations of prejudice and reliance are simply not cognizable in claims of Double Jeopardy.

The state implicitly acknowledges that prejudice is irrelevant to violations of the Double Jeopardy Clause.[62] Nevertheless, the state, along with amici curiae United States and Criminal Justice Legal Foundation (CJLF), persist in defending the Massachusetts Appeals Courts' reliance on its conclusion that reconsideration of Smith's acquittal did not prejudice him. They assert that prejudice is lacking because reconsideration of the acquittal supposedly did not affect Smith's trial strategy,[63] i.e., it did not affect Smith's decisions as to which witnesses to call and what evidence to present. But in *United States v. Jorn*, this Court refused to allow a mistrial-related Double Jeopardy claim to turn

> on an appellate court's post hoc assessment as to which party would in fact have been aided in the hypothetical event that the witnesses had been called to the stand . . . That conception of benefit, however, involves nothing more than an exercise in pure speculation.[64]

So the question is not whether the reconsideration of his acquittal prejudiced Smith. The Constitution answers that

[62] Resp. Br. at 24-25.

[63] Resp. Br. at 29; United States Br. at 27; CJLF Br. at 25; J.A. 126-27.

[64] *United States v. Jorn*, 400 U.S. 470, 483 (1971).



question definitively. Instead, if there is to be an inquiry as to prejudice, the question is actually whether the jury's consideration of the jeopardy-barred firearm charge prejudiced Smith as to the non-jeopardy barred offenses.[65] That issue should be remanded to the state court for further consideration.[66]

## CONCLUSION

This Court should reverse the judgment of the Massachusetts Appeals Court and remand the case to that court with directions to enter a judgment of not guilty of the firearm charge. The Court should also remand to the Massachusetts Appeals Court to determine whether consideration of the jeopardy-barred offense prejudiced Smith with regard to the charges of assault and battery with a dangerous weapon and armed assault with intent to murder.

Respectfully submitted,

DAVID NATHANSON
COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 Bromfield Street
Boston, MA 02108
617-482-6212

*Counsel for Petitioner*

[65] *Benton*, 395 U.S. at 797; *Price v. Georgia*, 398 U.S. 323, 331 (1970); *Morris v. Matthews*, 475 U.S. 237, 246-47 (1986); J.A. 115.

[66] *Matthews*, 475 U.S. at 248.

Supreme Court, U.S.
FILED
NOV 1 - 2004
OFFICE OF THE CLERK

(10)

No. 03-8661

# In the Supreme Court of the United States

MELVIN T. SMITH, PETITIONER

*v.*

MASSACHUSETTS

*ON WRIT OF CERTIORARI*
*TO THE APPEALS COURT OF MASSACHUSETTS*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

PAUL D. CLEMENT
*Acting Solicitor General*
*Counsel of Record*

CHRISTOPHER A. WRAY
*Assistant Attorney General*

MICHAEL R. DREEBEN
*Deputy Solicitor General*

SRI SRINIVASAN
*Assistant to the Solicitor General*

*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the Double Jeopardy Clause bars a trial court from reconsidering a ruling, made at the close of the prosecution's case, that the evidence is insufficient as a matter of law to sustain a conviction.

TABLE OF CONTENTS


| | Page |
|---|---|
| Interest of the United States | 1 |
| Constitutional provisions involved | 2 |
| Statement | 2 |
| Summary of argument | 6 |
| Argument: | |
| The Double Jeopardy Clause does not prohibit a trial court from reconsidering a ruling granting a motion for judgment of acquittal at the close of the prosecution's case | 8 |
| A. The grant of motion for acquittal may not be appealed when reversal would necessitate further trial proceedings on the charge | 9 |
| B. The Double Jeopardy bar against appeal of a trial court's grant of an acquittal does not diminish the Court's authority to reconsider and correct its own ruling | 12 |
| 1. A trial court possesses inherent authority to reconsider a mid-trial ruling granting a motion for acquittal | 12 |
| 2. A trial court's reconsideration of its mid-trial grant of an acquittal does not place the defendant twice in jeopardy | 15 |
| C. There is no warrant for extending the holding of *Smalis* to prohibit a trial court from correcting its erroneous, mid-trial grant of an acquittal | 18 |
| 1. Barring reconsideration of an erroneous grant of acquittal would compromise the interest in achieving just outcomes without advancing the values served by the Double Jeopardy Clause | 18 |

Table of Contents—Continued: Page

2. The approach pressed by petitioner is inconsistent with the background rule on interlocutory rulings and is unworkable ..... 22
3. Petitioner's arguments against permitting trial courts to correct an erroneous mid-trial acquittal are unpersuasive ..... 25
Conclusion ..... 28

## TABLE OF AUTHORITIES

Cases:

*Arizona* v. *Washington*, 434 U.S. 497 (1978) ..... 9, 18, 19, 21
*Burks* v. *United States*, 437 U.S. 1 (1978) ..... 20
*Commonwealth* v. *Smalis*, 480 A.2d 1046 (Pa. Super. Ct. 1984) ..... 10, 17
*Commonwealth* v. *Smith*, 788 N.E.2d 977 (Mass. App. Ct. 2003), cert. granted, 124 S. Ct. 2836 (2004) ..... 2, 3, 5, 6, 8, 22, 27
*Commonwealth* v. *Sperrazza*, 363 N.E.2d 673 (Mass. 1977) ..... 4
*DiBella* v. *United States*, 369 U.S. 121 (1962) ..... 10
*Finch* v. *United States*, 433 U.S. 676 (1977) ..... 11
*Fong Foo* v. *United States*, 369 U.S. 141 (1962) ..... 9, 20
*Green* v. *United States*, 355 U.S. 184 (1957) ..... 9, 21
*Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56 (1982) ..... 15
*John Simmons Co.* v. *Grier Bros.*, 258 U.S. 82 (1922) ..... 12-13
*Justices of Boston Mun. Court* v. *Lydon*, 466 U.S. 294 (1984) ..... 12, 16
*Kepner* v. *United States*, 195 U.S. 100 (1904) ..... 17
*Lee* v. *United States*, 432 U.S. 23 (1977) ..... 12
*Lowe* v. *State*, 744 P.2d 856 (Kan. 1987) ..... 24
*Monge* v. *California*, 524 U.S. 721 (1998) ..... 28
*Ohio* v. *Johnson*, 467 U.S. 493 (1984) ..... 18



Cases—Continued: Page

*People* v. *Williams*, 721 N.E.2d 524 (Ill. 1999) ..... 24
*Price* v. *Vincent*, 538 U.S. 634 (2003) ..... 24
*Schiro* v. *Farley*, 510 U.S. 222 (1994) ..... 18
*Serfass* v. *United States*, 420 U.S. 377 (1975) ..... 3, 8, 25
*Sanabria* v. *United States*, 437 U.S. 54 (1978) ..... 7, 17
*Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986) ..... 6, 8, 10, 11, 12, 14, 15, 20
*State* v. *Collins*, 771 P.2d 350 (Wash. 1989) ..... 24, 25
*Swisher* v. *Brady*, 438 U.S. 204 (1978) ..... 16, 17, 20, 21
*United States* v. *Baggett*, 251 F.3d 1087 (6th Cir. 2001), cert. denied, 534 U.S. 1167 (2002) ..... 1, 13-14, 24
*United States* v. *Baker*, 419 F.2d 83 (2d Cir. 1969), cert. denied, 397 U.S. 971 and 976 (1970) ..... 21
*United States* v. *Byrne*, 203 F.3d 671 (9th Cir. 2000), cert. denied, 531 U.S. 1114 (2001) ..... 1, 24
*United States* v. *Dieter*, 429 U.S. 6 (1976) ..... 14
*United States* v. *DiFrancesco*, 449 U.S. 117 (1980) ..... 9, 16, 17, 21, 23
*United States* v. *Healy*, 376 U.S. 75 (1964) ..... 14
*United States* v. *Hinderman*, 625 F.2d 994 (10th Cir. 1980) ..... 21
*United States* v. *Ibarra*, 502 U.S. 1 (1991) ..... 14
*United States* v. *Jenkins*, 420 U.S. 358 (1975) ..... 14
*United States* v. *Jerry*, 487 F.2d 600 (3d Cir. 1973) ..... 13
*United States* v. *Lane*, 768 F.2d 834 (7th Cir.), cert. denied, 474 U.S. 951 (1985) ..... 17, 22-23
*United States* v. *Leslie*, 103 F.3d 1093 (2d Cir.), cert. denied, 520 U.S. 1220 (1997) ..... 20
*United States* v. *LoRusso*, 695 F.2d 45 (2d Cir. 1982), cert. denied, 460 U.S. 1070 (1983) ..... 13
*United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977) ..... 9, 10, 12, 14, 26-27
*United States* v. *Rahman*, 189 F.3d 88 (2d Cir.), cert. denied, 528 U.S. 982 (1999) and 528 U.S. 1094 (2000) ..... 1, 24, 27

Cases—Continued: Page

*United States* v. *Rouse*, 111 F.3d 561 (8th Cir.), cert. denied, 522 U.S. 905 (1997) ..... 20
*United States* v. *Scott*, 437 U.S. 82 (1978) ..... 9, 10, 12, 18
*United States* v. *Tateo*, 377 U.S. 463 (1964) ..... 18
*United States* v. *Washington*, 48 F.3d 73 (2d Cir.), cert. denied, 515 U.S. 1151 (1995) ..... 13, 24
*United States* v. *Wilson*, 420 U.S. 332 (1975) ..... 9, 10, 21

Constitution and rule:

U.S. Const. Amend. V (Double Jeopardy Clause) ..... 2
Fed. R. Crim. P. 29(a) ..... 1

Miscellaneous:

Peter Westen & Richard Drubel, *Toward A General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81 (1979) ..... 8
18B Charles Alan Wright et al., *Federal Practice and Procedure* (2d ed. 2002) ..... 13

# In the Supreme Court of the United States

No. 03-8661

MELVIN T. SMITH, PETITIONER

*v.*

MASSACHUSETTS

*ON WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

### INTEREST OF THE UNITED STATES

This case presents the question whether the Double Jeopardy Clause bars a trial court from reconsidering a ruling, made at the close of the prosecution's case, that the evidence is insufficient as a matter of law to sustain a conviction. Because the Federal Rules of Criminal Procedure provide for the filing of a motion for judgment of acquittal after the government closes its evidence, Fed. R. Crim. P. 29(a), the question presented in this case arises in federal criminal trials. See, *e.g.*, *United States* v. *Baggett*, 251 F.3d 1087 (6th Cir. 2001), cert. denied, 534 U.S. 1167 (2002); *United States* v. *Byrne*, 203 F.3d 671 (9th Cir. 2000), cert. denied, 531 U.S. 1114 (2001); *United States* v. *Rahman*, 189 F.3d 88 (2d Cir.), cert. denied, 528 U.S. 982 (1999) and 528 U.S. 1094 (2000). The United States therefore has a significant interest in the Court's disposition of this case.

## CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides: "No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb."

## STATEMENT

1. In 1996, petitioner's girlfriend and co-defendant, Felicia Brown, lived with her family in a three-story building in Boston, Massachusetts. The family occupied the third floor of the building and part of the second floor, and rented the remainder of the second floor and the first floor to tenants. *Commonwealth* v. *Smith*, 788 N.E.2d 977, 980 (Mass. App. Ct. 2003).

On August 16, 1996, at 4:00 A.M., Brown's cousin, Christopher Robinson, descended the stairs from the third floor of the building to the second floor, intending to lie down. Robinson testified at trial that, as he reached the bottom of the stairs, he saw petitioner and Brown in Brown's bedroom. Petitioner shot Robinson three times with what appeared to be a .32 or .38 caliber pistol. Petitioner then said to Brown, "let's go." Robinson said to petitioner, "I know who you are, Melvin. Why you shoot me? Why you shoot me? I know who you are. Your name is Melvin." The shooting caused Robinson severe injuries and destroyed his digestive tract. While in the hospital, Robinson identified petitioner from a photographic array, and he later identified petitioner at trial. *Smith*, 788 N.E.2d at 980-981.

2. Petitioner was charged with unlawful possession of a firearm, assault with intent to murder, and assault and battery by means of a dangerous weapon. *Smith*, 788 N.E.2d at 980. Brown was tried jointly with



petitioner on a charge of being an accessory after the fact.

a. The charge of unlawful possession of a firearm required the Commonwealth to prove that the barrel of the firearm was less than 16 inches in length. See J.A. 107 n.1. At trial, the Commonwealth's case included testimony by Robinson that he was familiar with handguns and that the gun used by petitioner was a "pistol" that "appeared to be a .32 or a .38." J.A. 12-14; see J.A. 16-17. At the close of the Commonwealth's case, petitioner moved the trial court to enter a finding of not guilty on the firearm charge. J.A. 98-101. Petitioner argued, *inter alia*, that the Commonwealth had "not presented any evidence that the barrel of the firearm was less than sixteen inches." J.A. 98.

The trial court considered the motion in a colloquy with counsel outside the presence of the jury. J.A. 20-22. The Commonwealth argued that the jury could infer that the length of the barrel was less than 16 inches from the testimony by Robinson to the effect that the firearm was a pistol. J.A. 21. The court disagreed, stating, "I don't think that there is a basis in which a jury, based upon Mr. Robinson's testimony alone, can conclude that a pistol or a revolver has a barrel length of sixteen inches or less." *Ibid.* The Commonwealth responded that, if that were the court's interpretation, the Commonwealth would "be requesting to reopen and allow Mr. Robinson to testify to that." J.A. 22. The court ruled, however, that "this is the time in which they are moving for a required finding of not guilty," and "I'm going to allow it on the firearm charge." *Ibid.* The court's allowance of the motion was recorded on the trial docket and was attested on the motion, but it was not communicated to the jury. *Smith*, 788 N.E.2d at 981; Pet. App. 10a.

The trial then continued with presentation of the defense case on the remaining charges against petitioner and Brown. Those proceedings were completed the same morning. Petitioner presented no witnesses, but Brown called her mother to testify, and petitioner's counsel briefly cross-examined Brown's mother. J.A. 56-58. Petitioner and Brown rested their cases following the testimony of Brown's mother, and the jurors were excused for their morning recess. J.A. 58-59. After discussing the jury instructions with counsel, the court ordered a 15-minute recess. J.A. 71.

Before the proceedings resumed, the Commonwealth's attorney alerted the court to a decision by the Massachusetts Supreme Judicial Court, *Commonwealth* v. *Sperrazza*, 363 N.E.2d 673 (1977), which had held that jurors could conclude from testimony that a firearm was a pistol or revolver that the barrel length was less than 16 inches. J.A. 71-72. The court discussed the decision with counsel in a side-bar conference upon resumption of the proceedings. J.A. 71-74. The Commonwealth suggested that the court could submit the firearm charge to the jury and reserve a final decision on whether to grant petitioner's motion for a required finding of not guilty. J.A. 74. The court agreed with that suggestion, ruled that it would deny the motion "at this point," and submitted the charge to the jury. J.A. 74, 76, 77-79.

The following day, while the jury's deliberations were ongoing, petitioner's counsel asked the court to reconsider its decision to submit the firearm charge to the jury. J.A. 81. The court took the matter under advisement. J.A. 89. On the next day of trial, the court ruled that "the decision that I rendered, which denied the motion for a required finding of not guilty, will stand." J.A. 92. The jury found petitioner guilty on all



counts submitted to it, including the firearm charge. J.A. 93-95.

b. Petitioner moved for a new trial, arguing, *inter alia*, that the trial court was barred by the Double Jeopardy Clause from withdrawing its initial ruling that the evidence on the firearm charge was insufficient as a matter of law. J.A. 107-109. The court rejected that argument, reasoning that the circumstances were "analogous to a situation where a jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal." J.A. 109. The court explained that the "erroneous allowance of the motion for a required finding of not guilty was corrected before closing arguments, and [petitioner's] counsel had the option to seek a re-opening of the evidence" but "did not do so." *Ibid.* The court further found that petitioner "suffered no prejudice by the court's 'reversal' of its allowance of a required finding of not guilty." J.A. 109-110 n.2.

3. The Appeals Court of Massachusetts affirmed. *Smith*, 788 N.E.2d at 977. The court "conclud[ed] that double jeopardy protections were not violated in these circumstances because the judge's correction of her ruling did not require a second proceeding." *Id.* at 982.

The court also rejected petitioner's argument that the trial court's reconsideration infringed the requirement under Massachusetts law that, when a motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, the trial court must resolve the motion at that time. 788 N.E.2d at 982. The Appeals Court explained that the requirement did not "preclude[] a judge from correcting a ruling" at a later time. *Id.* at 983. The court reasoned, in addition, that the purpose of the requirement had been "honored" because petitioner "has not suggested that the allowance of the motion affected his trial strategy with regard to

the other charges," the "Commonwealth did not introduce any additional evidence," and petitioner "was provided the opportunity to reopen his case." *Ibid.* The court further determined that petitioner "was not otherwise prejudiced by the ruling. The jury were not aware that the judge had allowed the motion and the correction of the ruling was made before closing arguments." *Ibid.*

**SUMMARY OF ARGUMENT**

A trial court may reconsider a mid-trial ruling that the evidence presented by the prosecution is insufficient as a matter of law to establish guilt, because the court's interlocutory decision does not constitute a final judgment of acquittal within the meaning of the Double Jeopardy Clause. Under the Double Jeopardy Clause, a final judgment of acquittal has a special status: once there is a final judgment acquitting the defendant based on a finding that the evidence is insufficient to sustain a guilty verdict, the defendant may not be subjected to a new trial or to additional fact-finding proceedings on the charge. Accordingly, the prosecution may not appeal the grant of an acquittal when reversal would necessitate such proceedings. *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986).

Although *Smalis* bars an appeal from the grant of an acquittal at the completion of the prosecution's evidence, the trial court's reconsideration of its own ruling, as occurred in this case, raises distinct issues. A presupposition of appellate review—the context at issue in *Smalis*—is that the trial court has reached a definitive resolution in favor of acquittal. Any further proceedings on the charge thus could occur only as a consequence of the reviewing court's direction.

While the case remains in the trial court, in contrast, the settled rule is that the court possesses an inherent



authority to reconsider and correct its interlocutory rulings. That rule reflects the recognition that, in the highly fluid context of an ongoing trial, a trial court will often be required to render interlocutory rulings without the benefit of adequate deliberation. Barring the court from reconsidering its rulings would disserve the interest in administering justice. Because a trial court's interlocutory ruling granting an acquittal is subject to an inherent authority to reconsider, the prohibition against post-acquittal trial proceedings recognized in *Smalis* is inapplicable.

A trial court's reconsideration of its grant of an acquittal at the close of the prosecution's evidence does not offend double jeopardy values. Because reinstatement of the charge would merely lead to completion of the initial trial, the prosecution would have no opportunity to improve its case or wear down the defendant by initiating a second trial. For the same reason, the defendant would retain his right to resolution of the charges against him by the initial tribunal—jury or judge—before which jeopardy has attached. Moreover, the burdens on the defendant from continuing the trial to completion are no greater than if the trial court had reserved ruling on the motion for acquittal.

Prohibiting a trial court from reconsidering its erroneous grant of an acquittal would compromise the societal interest in achieving just outcomes and affording the prosecution one full and fair opportunity to obtain a conviction. And it would compromise those interests in a manner not presented by the bar against appeal recognized in *Smalis*: Barring a trial court from reconsidering its erroneous grant of an acquittal would allow a defendant to retain the benefit of an acquittal even though *no* court—including that one that initially awarded it—believes it to be justified. There is no

warrant for extending holding of *Smalis* to those circumstances and granting the defendant a windfall to which no court believes him entitled.

## ARGUMENT

### THE DOUBLE JEOPARDY CLAUSE DOES NOT PROHIBIT A TRIAL COURT FROM RECONSIDERING A RULING GRANTING A MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE PROSECUTION'S CASE

Although this Court has held that a trial court's grant of a motion for judgment of acquittal at the close of the prosecution's case may not be reviewed in an interlocutory appeal, *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986), this case involves reconsideration of such a ruling by the trial court itself, not reversal by an appellate court. Those two contexts are distinct from the perspective of the Double Jeopardy Clause.

As the Court has explained, "the language of cases in which we have held that there can be no appeal from, or further prosecution after, an 'acquittal' cannot be divorced from the procedural context in which the action so characterized was taken. The word itself has no talismanic quality for purposes of the Double Jeopardy Clause." *Serfass* v. *United States*, 420 U.S. 377, 392 (1975) (citation omitted); see Peter Westen & Richard Drubel, *Toward A General Theory Of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 137-138 ("For purposes of double jeopardy, an acquittal is a conclusory term used to describe rulings possessing the quality of finality."). A trial court's reconsideration—and correction—of an erroneous, mid-trial grant of an acquittal does not infringe the Double Jeopardy Clause.



### A. The Grant Of A Motion For Acquittal May Not Be Appealed When Reversal Would Necessitate Further Trial Proceedings On The Charge

1. The Double Jeopardy Clause "protect[s] an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green* v. *United States*, 355 U.S. 184, 187 (1957). Although "the prohibition against multiple trials is the 'controlling constitutional principle,'" *United States* v. *DiFrancesco*, 449 U.S. 117, 132 (1980) (quoting *United States* v. *Wilson*, 420 U.S. 332, 346 (1975)), there is no absolute prohibition against a retrial when the initial trial ends either in a conviction or in the declaration of a mistrial, see *id.* at 130-133. But the "law attaches particular significance to an acquittal," "whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict." *United States* v. *Scott*, 437 U.S. 82, 91 (1978); see *DiFrancesco*, 449 U.S. at 129-130.

An acquittal, whether the product of a jury verdict of not guilty or a judicial determination that the evidence of guilt is insufficient as a matter of law, affords absolute protection against a new trial for the same offense. See *Scott*, 437 U.S. at 91; *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571-576 (1977). The "Constitution conclusively presumes that a second trial would be unfair" following an acquittal, and the "defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" *Arizona* v. *Washington*, 434 U.S. 497, 503 (1978) (quoting *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962)). Because an acquittal forecloses a second trial, double jeopardy principles also preclude any appeal of an acquittal when reversal would require a new trial. See

*Scott*, 437 U.S. at 91; *Martin Linen Supply*, 430 U.S. at 570-571.

The Court has recognized an exception to the bar against appeal of an acquittal when the trial court grants a judgment of acquittal after the jury has returned a verdict of guilty: an appeal by the prosecution is allowed in that situation because reversal would entail reinstatement of the jury verdict rather than commencement of a new trial. See *Scott*, 437 U.S. at 91 & n.7; *Martin Linen Supply*, 430 U.S. at 569-570; *Wilson*, 420 U.S. at 335-336, 342-345, 352-353.

2. In *Smalis* v. *Pennsylvania*, this Court held that the "Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.'" 476 U.S. at 145-146 (quoting *Martin Linen Supply*, 430 U.S. at 570). The trial court in *Smalis* ruled at the close of the prosecution's case that the evidence was insufficient as a matter of law on certain of the charges. *Id.* at 141. The court then stayed completion of the trial on the remaining charges pending a mid-trial appeal by the prosecution of the court's acquittal ruling. *Ibid.* That highly anomalous procedure was possible because the case was tried to the bench rather than a jury.[1]

[1] The Pennsylvania Superior Court concluded that the trial court's decision to allow a mid-trial appeal was "not recommended," explaining that, "[a]fter a criminal trial has been commenced, it should not be delayed by piecemeal appeals from orders which do not terminate the proceedings finally." *Commonwealth* v. *Smalis*, 480 A.2d 1046, 1048 n.1 (1984). Cf. *DiBella* v. *United States*, 369 U.S. 121, 126 (1962) ("the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law").



The Commonwealth argued that its mid-trial appeal was permissible because reversal of the trial court's acquittal order would lead only to resumption of the initial trial rather than commencement of a new trial. 476 U.S. at 145-146. This Court disagreed, holding that the appeal of an acquittal is barred by the Double Jeopardy Clause when reversal would lead to further trial proceedings, even if not an entirely new trial. *Id.* at 146; see *Finch* v. *United States*, 433 U.S. 676 (1977) (holding that finding of not guilty based on stipulated facts is not subject to appeal notwithstanding that reversal would not require additional evidentiary proceedings).

Petitioner reads *Smalis* to establish that the grant of a motion for judgment of acquittal cannot be reconsidered by the trial court consistent with the Double Jeopardy Clause. Pet. Br. 24, 25-27. Petitioner reasons (Br. 24) that "jeopardy irrevocably terminates" upon such a ruling, because any reconsideration of the ruling by the trial court—like the mid-trial appeal in *Smalis*—"would translate into further proceedings of some sort, devoted to the resolution of factual issues" on the charge. 476 U.S. at 146 (internal quotation marks omitted). That argument overlooks the distinction between reconsideration of an initial ruling by the trial court itself and reversal of the ruling by a separate tribunal on appeal.

### B. The Double Jeopardy Bar Against Appeal Of A Trial Court's Grant Of An Acquittal Does Not Diminish The Court's Authority To Reconsider And Correct Its Own Ruling

A "trial court's ruling in favor of the defendant is an acquittal only if it 'actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Lee* v. *United States*, 432 U.S. 23, 30 n.8 (1977) (citation omitted); see *Scott*, 437 U.S. at 97; *Martin Linen Supply*, 430 U.S. at 571. The prohibition against "postacquittal factfinding proceedings" recognized in *Smalis*, 476 U.S. at 145, thus comes into play only if the trial court has "actually" reached its "resolution" of "the factual elements of the offense charged," *Lee*, 432 U.S. at 30 n.8. See *Justices of Boston Mun. Court* v. *Lydon*, 466 U.S. 294, 309 (1984) (emphasizing the need for a "resolution" in order to trigger the double jeopardy bar against further trial proceedings). An appeal necessarily implicates the prohibition against post-acquittal trial proceedings, see *Smalis*, 476 U.S. at 145-146, because an appeal presupposes that the trial court has reached its resolution on the charge. When a trial court reconsiders its own initial decision to grant a motion for judgment of acquittal, by contrast, the court by definition has not reached its resolution—the very purpose of the court's reconsideration is to determine what resolution it will reach.

#### 1. *A trial court possesses inherent authority to reconsider a mid-trial ruling granting a motion for acquittal*

a. It has long been settled that trial courts possess an inherent authority to reconsider and correct their interlocutory rulings, and all rulings before the final decree is entered remain inherently interlocutory. See, *e.g.*, *John Simmons Co.* v. *Grier Bros.*, 258 U.S. 82, 88



(1922) ("If it be only interlocutory, the court at any time before final decree may modify or rescind it."). That authority rests on the recognition that the trial context is highly fluid and frequently compels the court to rule without the benefit of adequate deliberation; and the interests of justice therefore would not be served by precluding a court from reconsidering its interlocutory rulings. See 18B Charles Alan Wright et al., *Federal Practice and Procedure* § 4478.1 (2d ed. 2002) ("All too often, * * * a trial court could not operate justly if it lacked power to reconsider its own rulings as an action progresses toward judgment. Far too many things can go wrong, particularly with rulings made while the facts are still undeveloped or with decisions made under the pressures of time and docket.").

The basic power of a trial court to reconsider its interlocutory rulings exists in criminal cases as well as civil cases. See, *e.g.*, *United States* v. *Washington*, 48 F.3d 73, 79 (2d Cir.), cert. denied, 515 U.S. 1151 (1995); *United States* v. *LoRusso*, 695 F.2d 45, 52-53 (2d Cir. 1982) ("district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment, whether they be oral * * * or written") (citations omitted), cert. denied, 460 U.S. 1070 (1983); *United States* v. *Jerry*, 487 F.2d 600, 605 (3d Cir. 1973) ("whether the case * * * be civil or criminal," as "long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so"). As a result, a trial court's "grant of a motion for acquittal is 'no more than an interlocutory order,' which the court has 'inherent power to reconsider and modify . . . prior to the entry of judgment." *Washington*, 48 F.3d at 79 (quoting *LoRusso*, 695 F.2d at 52-53); see *United States* v. *Baggett*, 251 F.3d 1087,

1095 (6th Cir. 2001) (explaining that "an oral grant of a Rule 29 motion outside of the jury's presence does not terminate jeopardy, inasmuch as a court is free to change its mind prior to the entry of judgment"), cert. denied, 534 U.S. 1167 (2002).

Not only does a trial court possess an inherent authority to reconsider its interlocutory grant of an acquittal, but a request by the prosecution for the court to reconsider its ruling—or an indication by the court *sua sponte* that it may do so—makes clear that the initial ruling may not constitute its resolution of the charge. Cf. *United States* v. *Ibarra*, 502 U.S. 1, 6 (1991) (observing that "a motion for rehearing in a criminal case * * * renders an otherwise final decision of a district court not final until it decides the petition for rehearing"); *United States* v. *Dieter*, 429 U.S. 6 (1976); *United States* v. *Healy*, 376 U.S. 75 (1964).[2] A request to reconsider the mid-trial grant of an acquittal or a suggestion to that effect by the court explicitly renders the matter unresolved.

b. An appeal from a trial court's grant of an acquittal presents the reverse situation, in which the trial court's ruling by nature represents its final resolution of the charge. An appeal from the grant of a motion for acquittal—whether an interlocutory appeal, see *Smalis*, 476 U.S. at 145-146, or an appeal from a final judgment following discharge of the jury, see *Martin Linen Supply*, 430 U.S. at 570—presupposes that the trial court has reached its resolution.

---

[2] This Court's decisions in *Ibarra*, *Dieter*, and *Healy*, address the implications of a motion for rehearing for the appealability of a judgment in a federal criminal case. Those decisions hold that a motion for rehearing has the effect of rendering the court's judgment non-final and thus non-appealable, so that the time for taking an appeal begins to run only after the court rules on the motion.



That is because appellate review of the trial court's grant of an acquittal generally leaves the court powerless to alter the ruling of its own accord. See *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) (The "filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). If a trial court's grant of an acquittal were subject to appellate review, any further proceedings on the charge could ensue only from direction by the appellate court, not reconsideration by the trial court. Whether the ruling were affirmed or reversed, the trial court would be bound to act in accordance with the appellate determination. Moreover, the government's taking of an appeal indicates the government's belief that the trial court has completed its resolution of the charge. Because an appeal necessarily presumes that the trial court has arrived at its final resolution, appeal of a mid-trial ruling granting a judgment of acquittal squarely implicates the double jeopardy bar against post-acquittal fact-finding proceedings. See *Smalis*, 476 U.S. at 145-146.

***2. A trial court's reconsideration of its mid-trial grant of an acquittal does not place the defendant twice in jeopardy***

When considered against the backdrop of the settled rule that trial courts have inherent authority to reconsider interlocutory rulings, a trial court's correction of a mid-trial ruling granting an acquittal does not place the defendant "twice" in jeopardy within the meaning of the Double Jeopardy Clause. Rather, the proceedings, including any potential reconsideration of the ruling and reinstatement of the charge, are part of a single, continuing "jeopardy."

That conclusion is supported by this Court's decision in *Swisher* v. *Brady*, 438 U.S. 204 (1978). *Swisher* involved a two-stage system for juvenile court adjudications in Maryland under which a court master, after receiving the evidence, reported his proposed findings, conclusions, recommendations, and orders to the juvenile court. Although the master's proposals were not considered final action until acted on by the juvenile court, the court could simply adopt (or modify or reject) the master's proposed rulings, the court was limited to the record before the master absent the parties' consent to supplement the record, and the master served his report on the State and the juvenile who could then file exceptions to the report in the juvenile court. *Id.* at 210-211, 215-216.

A class of juveniles contended that, in cases in which the master concludes that the State has failed to establish guilt beyond a reasonable doubt and reports that conclusion in his proposed findings and orders to the juvenile court, the juvenile court is barred by double jeopardy principles from considering the State's exceptions to the master's proposed findings. This Court rejected that argument and held that a juvenile is not put twice in jeopardy by the court's review of the master's conclusions. Instead, he is "subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge." 438 U.S. at 215; see *DiFrancesco*, 449 U.S. at 140-141 (explaining that *Swisher* involved a "continuing single process"). See also *Lydon*, 466 U.S. at 309 (treating two-stage proceeding as one continuous proceeding for purposes of Double Jeopardy Clause).

The trial court's reconsideration in this case of its initial ruling granting an acquittal manifestly was part of a "continuing single process." *DiFrancesco*, 449 U.S.



at 141. Just as the juvenile court in *Swisher* had authority to adopt, modify, or reject the master's findings and orders recommending an acquittal, the background rule is that a trial court possesses inherent authority to modify or withdraw its own interlocutory ruling in favor of an acquittal.[3] The State's filing of exceptions to the master's findings in favor of an acquittal in *Swisher* is comparable to the prosecution's seeking reconsideration of a trial court's interlocutory grant of an acquittal. Unlike an appeal, which transfers the proceedings to a different court for review, reconsideration by the trial court continues a "single proceeding" before a single tribunal. *Swisher*, 438 U.S. at 215; see *id.* at 217-218 & n.15 (distinguishing *United States* v. *Jenkins*, 420 U.S. 358 (1975), and *Kepner* v. *United States*, 195 U.S. 100 (1904), in part on ground that both decisions involved "appellate review").

It is notable in this regard that, in both *Smalis* and *Sanabria* v. *United States*, 437 U.S. 54 (1978)—decisions on which petitioner substantially relies (Pet. Br. 19, 24)—the trial courts had entertained motions to reconsider the mid-trial grant of a motion for acquittal, ultimately concluding that the initial ruling was correct. See *Sanabria*, 437 U.S. at 59-60; *Smalis*, 480 A.2d at 1048 n.2. Although this Court concluded in both cases that the Double Jeopardy Clause barred any appeal from the trial court's mid-trial grant of an acquittal, there was no suggestion in either case that double

---

[3] See *United States* v. *Lane*, 768 F.2d 834, 841 (7th Cir.) (explaining that the "law of Illinois is that until the court enters the sentence, [the] proceedings have not come to a conclusion," and that, because "the judge may change his mind," "[w]hat the judge says after trial in Illinois is less 'final' than the master's recommendation in *Swisher*"), cert. denied, 474 U.S. 951 (1985).

jeopardy barred the trial courts' reconsideration of their own mid-trial rulings.

### C. There Is No Warrant For Extending The Holding Of *Smalis* To Prohibit A Trial Court From Correcting Its Erroneous, Mid-Trial Grant Of An Acquittal

#### 1. *Barring reconsideration of an erroneous grant of acquittal would compromise the interest in achieving just outcomes without advancing the values served by the Double Jeopardy Clause*

When defining the contours of double jeopardy protections, this Court has balanced the interests of defendants "against the public interest in insuring that justice is meted out to offenders." *Scott*, 437 U.S. at 92; see *Arizona* v. *Washington*, 434 U.S. at 503 n.11 (observing that interests of defendants promoted by Clause are sometimes "subordinate to a larger interest in having the trial end in a just judgment"); *United States* v. *Tateo*, 377 U.S. 463, 466 (1964). That balance dictates that the Court should not extend the bar against interlocutory appeal of a mid-trial acquittal to the distinct context of reconsideration of such a ruling by the trial court itself.

a. The Court's double jeopardy decisions recognize the "public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Arizona* v. *Washington*, 434 U.S. at 505; see *id.* at 509 (noting the interest in "in giving the prosecution one complete opportunity to convict those who have violated its laws"); accord *Schiro* v. *Farley*, 510 U.S. 222, 230 (1994); *Ohio* v. *Johnson*, 467 U.S. 493, 501 (1984). Precluding a trial court from reconsidering its grant of an acquittal would frustrate that interest in a manner that the prohibition against appeal of an acquittal does not: barring reconsideration by the trial



court itself would permit a defendant who may be guilty to obtain the benefit of an acquittal even though *no* court—not even the one that initially granted him an acquittal—believes him entitled to it. Because the prosecution would be barred from going forward even though no tribunal believes that the evidence is insufficient to convict, the prosecution would not be afforded "one full and fair opportunity" to establish the defendant's guilt. *Arizona* v. *Washington*, 434 U.S. at 505.

The prosecution's "one full and fair opportunity" incorporates the background rule that trial courts have inherent authority to reconsider their interlocutory rulings until the proceedings are completed. That rule is grounded in the recognition that the demands of trial frequently result in erroneous interlocutory rulings made without the benefit of adequate deliberation. This case is illustrative. Although the Commonwealth, when the trial court initially raised the issue, correctly argued that the barrel length of the firearm possessed by petitioner could be inferred from the testimony that the firearm was a pistol, see J.A. 21, the court ruled that the evidence was insufficient, stating "I don't think" the jury can draw such an inference, J.A. 21-22. That same morning, during the next break in the proceedings, the Commonwealth brought to the court's attention an appellate decision that demonstrated the correctness of the Commonwealth's position, whereupon the court withdrew its previous ruling. J.A. 71-74. Barring a trial court from correcting its initial ruling in such circumstances—particularly when the prosecution has correctly interpreted the law from the outset—would deny the prosecution a full and fair opportunity to obtain a conviction.[4]

---

[4] Petitioner's approach would treat an erroneous grant of an acquittal as irrevocable even if the ruling were issued before the

b. The decision in *Smalis* rested on concerns that permitting an appeal "would frustrate the interest of the accused in having an end to the proceedings against him" after he has convinced the trial court that he is entitled to be acquitted as a matter of law. 476 U.S. at 145. Nothing in the values underlying the Double Jeopardy Clause requires extending that holding to circumstances in which even the trial court itself recognizes that its ruling was incorrect and that the charge should go to the jury.

For instance, when a court reconsiders its grant of an acquittal at the close of the prosecution's case, it does not afford "the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks* v. *United States*, 437 U.S. 1, 11 (1978). The prosecution has completed presentation of its case and seeks only to submit the charge to the jury.[5] In addition, because reconsideration only results

---

prosecution has finished presenting its case, see *Fong Foo*, 369 U.S. at 141-142, a point at which the prosecution plainly has not been afforded one full opportunity to establish guilt.

[5] There is no merit to the argument of petitioner's amicus (NACDL Br. 7-9) that the Commonwealth was afforded a "forbidden 'second crack'" (*Swisher*, 438 U.S. at 216) when it brought legal authority to the trial court's attention demonstrating that the court's grant of an acquittal was incorrect. The concern under the Double Jeopardy Clause is with affording the prosecution "another opportunity to supply *evidence*," not legal argument. *Burks*, 437 U.S. at 11 (emphasis added). Moreover, even with respect to the submission of evidence, a "trial court has broad discretion to allow the prosecution to reopen to establish an element of an offense after the defendant has moved for judgment of acquittal." *United States* v. *Rouse*, 111 F.3d 561, 573 (8th Cir.), cert. denied, 522 U.S. 905 (1997); see *United States* v. *Leslie*, 103 F.3d 1093, 1104 (2d Cir.) ("In any event, even after a defendant moves * * * for acquittal, a district judge retains wide discretion to allow the government to re-open its case to correct errors 'or some other compelling circumstance . . . justifies a reopening and no substantial prejudice will occur.'") (quoting *United States* v. *Hinderman*, 625 F.2d 994, 996 (10th Cir. 1980)), cert. denied, 520 U.S. 1220 (1997).



in continuation of the trial before the initial finder of fact, it does not infringe the defendant's "valued right to have [his] trial concluded by a particular tribunal." *Arizona* v. *Washington*, 434 U.S. at 505; see *Swisher*, 438 U.S. at 216. For the same reason, reconsideration does not "enhanc[e] the risk that an innocent defendant may be convicted" as a consequence of undergoing a series of prosecutions before a succession of fact-finders. *Swisher*, 438 U.S. at 216 (quoting *Arizona* v. *Washington*, 434 U.S. at 504); see *DiFrancesco*, 449 U.S. at 130.

Finally, when a trial court, upon reconsideration, permits the trial to proceed to completion on the reinstated charge, it does not "unfairly subject[] the defendant to the embarrassment, expense, and ordeal of a second trial." *Swisher*, 438 U.S. at 216 (citing *Green*, 355 U.S. at 184). The burdens on the defendant are no different than if the court had initially denied an acquittal or had reserved its ruling. Although the ruling might give rise to a temporary belief by the defendant that he is free on the charge, that sort of expectation does not fall within the protections of the Double Jeopardy Clause. See *United States* v. *Baker*, 419 F.2d 83, 89 (2d Cir. 1969) (explaining that, although the defendant's "hopes were first raised, then quickly lowered" when the court reconsidered its grant of an acquittal, "so ephemeral and insubstantial an injury" raises no double jeopardy violation), cert. denied, 397 U.S. (1970); cf. *Wilson*, 420 U.S. at 345 ("Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defen-

dant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.").

**2. *The approach pressed by petitioner is inconsistent with the background rule on interlocutory rulings and is unworkable***

a. Under petitioner's proposed approach, a mid-trial ruling granting a motion for acquittal would be irrevocable. Petitioner allows, however, that if the court were to express its ruling in a manner that expressly leaves open the possibility of further consideration, the ruling would not merit treatment under the Double Jeopardy Clause as an irrevocable acquittal. See Pet. Br. 21.

Petitioner's effort to distinguish between definitive and equivocal mid-trial rulings is misguided. As a consequence of the settled background rules governing interlocutory orders, *all* mid-trial rulings granting an acquittal—no matter how definitively expressed at the time—are implicitly subject to the inherent authority of courts to reconsider them. Massachusetts abides by the universal background rule. See *Smith*, 788 N.E.2d at 983. There is no reason a different rule should apply when a court makes explicit what is always implicit. Rather, rulings that remain interlocutory—whether because the court says so explicitly or because the proceedings are ongoing—should not be given the treatment of a final judgment of acquittal under the Double Jeopardy Clause.[6]

---

[6] As the Court of Appeals for the Seventh Circuit has explained:

> Suppose a federal district judge, after a bench trial, said to the defendant: "In light of the evidence of mitigation I have heard, I am inclined to find you not guilty. But I must consider my decision with greater care and read the pertinent cases. Your case is taken under advisement." If the judge later entered a judgment of guilt, there could be no serious argument that the judgment violated the Double Jeopardy Clause. Under the law of Illinois, what the trial judge did has the same effect as this statement of a district judge.

*Lane*, 768 F.2d at 841; see *id.* at 842 ("The Double Jeopardy Clause does not prevent Illinois from giving its trial judges time to rethink ill-considered statements they may issue immediately after hearing the evidence.").



Because the trial court's ruling inherently was subject to reconsideration, any measures taken to formalize it—such as endorsing the motion by the clerk or registering the ruling on the docket (Pet. Br. 21)—should be largely immaterial. Memorializing the ruling does not alter its essential character. Cf. *DiFrancesco*, 449 U.S. at 142 ("The exaltation of form over substance is to be avoided. The Court has said that in the double jeopardy context it is the substance of the action that is controlling, and not the label given that action.").

b. Petitioner's distinction between definitive and equivocal rulings not only is unsound as a legal matter, but it also is largely unworkable as a practical matter. When a defendant moves for a judgment of acquittal at the close of the prosecution's case, the trial court, in the interests of avoiding an extended delay before resuming the trial, frequently will rule on the motion orally. The determination whether the court definitively granted an acquittal thus would often turn on a parsing of the judge's extemporaneous remarks from the bench. The inquiry would entail the drawing of fine distinctions based on the exact words used by the trial judge and the extent to which statements suggesting a

decision to grant an acquittal are sufficiently distinct from remarks indicating equivocation.[7]

As one court has explained, "[m]uch of the determination [would] come[] down to after-the-fact analysis

---

[7] See, *e.g.*, *Price* v. *Vincent*, 538 U.S. 634, 637 (2003) (trial judge stated that "my impression at this time is that there's not been shown premeditation or planning * * * [t]hat what we have at the very best is Second Degree Murder," and judge later agreed to hear reargument on the issue); *Baggett*, 251 F.3d at 1091-1092 (trial judge initially stated that "I don't believe that the proof has made out a case of interstate domestic violence," agreed immediately thereafter to "hold [its ruling] in abeyance," but then later stated that it had "granted the motion" for a judgment of acquittal); *United States* v. *Byrne*, 203 F.3d 671, 674 (9th Cir. 2000) (court first stated that it was "granting the defendant's motion under Rule 29," but then "immediately after that announcement" was asked to reconsider its ruling, which it ultimately agreed to do, observing, "I have made up my mind, unless I can be convinced otherwise"), cert. denied, 531 U.S. 1114 (2001); *United States* v. *Rahman*, 189 F.3d 88, 132-134 (2d Cir.) (court orally grants motion for acquittal, indicates on the next day of trial that it is willing to reconsider the ruling, and on the following day reinstates the charges), cert. denied, 528 U.S. 982 (1999); *United States* v. *Washington*, 48 F.3d 73, 79 (2d Cir.) (court "orally granted [the] motion for acquittal" on one count at the close of the government's case, resumed the trial on the remaining charge, but then reversed its ruling during an adjournment for lunch after one defense witness had begun testifying), cert. denied, 515 U.S. 1151 (1995); *People* v. *Williams*, 721 N.E.2d 524, 526 (Ill. 1999) (judge states that "I'm going to grant the motion for a directed finding and finding of not guilty," but then says to the prosecutor later in the course of the same colloquy, "if you want to provide me with something, I'll be happy to look at it if you want me to hold that in abeyance but I don't think that it's established"); *State* v. *Collins*, 771 P.2d 350, 351 (Wash. 1989) (court grants acquittal but then, "[m]inutes later," prosecutor offers contrary authority, prompting judge to "reverse[] his first ruling"); *Lowe* v. *State*, 744 P.2d 856, 856-857 (Kan. 1987) (court grants acquittal *sua sponte* but then reverses its ruling the following morning before trial resumes).



of subtle distinctions preserved in the record of the proceedings. The outcome of something as important as deciding whether a defendant was exposed to double jeopardy should not hang on such guesswork." *State* v. *Collins*, 771 P.2d 350, 353 (Wash. 1989). Distinguishing a situation involving the grant of an acquittal followed promptly by reconsideration from one involving equivocation all along would prove especially difficult because "[i]ndividual trial judges' styles of ruling vary. Many judges will think out loud along the way to reaching the final result." *Ibid.* This Court, when construing the Double Jeopardy Clause, "ha[s] disparaged" the sort of "'rigid, mechanical' rules" contemplated by petitioner's approach. *Serfass*, 420 U.S. at 390 (citation omitted). The sounder approach would give effect to a trial court's inherent authority to reconsider its interlocutory rulings, a rule born of the recognition that the trial context is highly fluid and that precluding reconsideration would disserve the interest in achieving just outcomes.

### 3. *Petitioner's arguments against permitting trial courts to correct an erroneous mid-trial acquittal are unpersuasive*

a. Petitioner and his amicus argue (Pet. Br. 26-28; NACDL Br. 3-7) that allowing reconsideration of mid-trial acquittals would produce anomalous outcomes, because reconsideration, as a practical matter, would be available more frequently in cases in which the jury remains impaneled to consider any additional charges against the defendant or co-defendants. In petitioner's view, the likelihood that a mid-trial acquittal would be subject to reconsideration should not turn on the "fortuity" (Pet. Br. 28) of whether the case involves multiple charges or defendants and the jury thus remains impaneled. Petitioner's argument lacks merit.

That a rule permitting reconsideration of an erroneous ruling on the sufficiency of the evidence may incidentally have varying practical implications in different factual circumstances does not call into question the legal soundness of the rule under the Double Jeopardy Clause. There is no cognizable interest under the Double Jeopardy Clause in enabling a defendant to convert an acquittal that the rendering court recognizes was legally erroneous into an irrevocable windfall, when there remains a practical means for the court to correct its own error. Because no defendant has a protected interest in precluding a judge from correcting his own erroneous, interlocutory acquittal, petitioner errs in arguing that permitting reconsideration in a class of cases is anomalous because similar errors in a different class of cases would be more difficult to correct as a practical matter.

It is petitioner's approach that would give rise to anomalous results. Under that approach, whether the grant of an acquittal is immune from reconsideration would turn on such factors as the administrative steps that may have been taken by the court or the clerk to memorialize the ruling, the extent to which the ruling is expressed definitively or is instead accompanied by remarks suggesting equivocation, and the amount of time separating any such equivocal statements from announcement of the ruling or actions formalizing the ruling. The ability of a trial court to correct an erroneous acquittal should not turn on the formal happenstance of whether the clerk registers the ruling on the docket before the court indicates an inclination to reconsider it. Cf. *Martin Linen Supply*, 430 U.S. at 571 ("[W]e have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action.").



b. Petitioner argues for "conclusively presuming unfairness" (Pet. Br. 35) when a trial court revisits its grant of an acquittal. There is no warrant for that across-the-board presumption. Reconsideration of an erroneous grant of acquittal does not invariably impair the defendant's ability to present a defense on the reinstated charge or any other charges.[8] The existence or extent of any such prejudice would depend on the circumstances of a particular case, and would more squarely implicate the Due Process Clause than the Double Jeopardy Clause.

Although petitioner argues that the trial court's reconsideration in this case prejudiced his presentation of his defense, Pet. Br. 34-37, the trial court found that petitioner "had the option to seek a re-opening of the evidence" and had "suffered no prejudice" from the court's withdrawal of its initial ruling, J.A. 109-110 & n.2. The Appeals Court similarly determined that petitioner could have reopened the evidence on the reinstated firearm charge, that he made no suggestion that the reconsideration adversely affected his trial strategy on the other charges, and that he "was not otherwise prejudiced." *Smith*, 788 N.E.2d at 982.

c. Finally, prohibiting trial courts from reconsidering mid-trial acquittals is unlikely to redound to the

---

[8] For instance, in *Rahman*, 189 F.3d at 132- 134, the trial court definitively stated to counsel that it had ruled on the defendant's motion for acquittal and was granting it, the government moved for reconsideration on the next day of trial, and the court indicated in response that it would reconsider its earlier ruling. The court of appeals explained that the defendant had "suffered no prejudice of any kind; he did not lose any opportunity to offer evidence, or commit himself to any course of defense that needed reassessment in light of the changed ruling." *Id.* at 134. In addition, "[n]one of [the] proceedings involving the defendant's motion took place in the presence of the jury." *Ibid.*

benefit of defendants as a systemic matter. There is no requirement to afford defendants an opportunity to obtain a judgment of acquittal from the trial court before submission of the case to the jury. If trial courts are barred from reconsidering mid-trial acquittal motions, they may be inclined to deny the motions (or at least defer their decision) to avoid the prospect of issuing an irrevocable ruling that would forbid further reflection and permanently foreclose prosecution of the charge. And States may be less willing to allow courts to grant motions for an acquittal before a jury verdict if there is a risk that a judge's first impression may prevent the charge from going to the jury, even if the judge soon after recognizes his or her error. See *Monge* v. *California*, 524 U.S. 721, 734 (1998) (denying double jeopardy protection to sentencing determinations in non-capital sentencing proceedings in part because doing so might diminish a State's willingness to provide procedural protections in such proceedings).

## CONCLUSION

The judgment of the Appeals Court of Massachusetts should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
*Acting Solicitor General*
CHRISTOPHER A. WRAY
*Assistant Attorney General*
MICHAEL R. DREEBEN
*Deputy Solicitor General*
SRI SRINIVASAN
*Assistant to the Solicitor General*

NOVEMBER 2004

(6)

No. 03-8661

NOV - 1 2004

IN THE

# Supreme Court of the United States

MELVIN T. SMITH,

*Petitioner*,

*vs.*

COMMONWEALTH OF MASSACHUSETTS,

*Respondent.*

**On Writ of Certiorari to the Appeals Court of Massachusetts**

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

*Attorneys for Amicus Curiae Criminal Justice Legal Foundation*

## QUESTION PRESENTED

When a trial court grants a motion for acquittal on a charge based on an incorrect interpretation of the law, does the Double Jeopardy Clause prevent that trial court from reconsidering its decision and reinstating the charge before the case is submitted to the jury?

## TABLE OF CONTENTS

Question presented ..... i

Table of authorities ..... iv

Interest of *amicus curiae* ..... 1

Summary of facts and case ..... 2

Summary of argument ..... 4

Argument ..... 5

I

In its current form, the Double Jeopardy Clause can create windfalls for the defendant at the expense of society's compelling interest in punishing the clearly guilty ..... 5

II

The Double Jeopardy Clause should only apply when the interests it protects are clearly threatened ..... 10

III

There is no threat to the interests protected by the Double Jeopardy Clause that justifies invoking the Clause in this case ..... 19

Conclusion ..... 26

## TABLE OF AUTHORITIES

### Cases

Arizona v. Rumsey, 467 U. S. 203, 81 L. Ed. 2d 164, 104 S. Ct. 2305 (1984) ..... 8

Arizona v. Washington, 434 U. S. 497, 54 L. Ed. 2d 717, 98 S. Ct. 824 (1978) ..... 9

Benton v. Maryland, 395 U. S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969) ..... 7

Burks v. United States, 437 U. S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978) ..... 8, 22, 24

Commonwealth v. Smalis, 480 A. 2d 1046 (Pa. Super. 1984) ..... 21

Commonwealth v. Smith, 788 N. E. 2d 977 (Mass. App. Ct. 2003) ..... 2, 3, 4, 22, 25

Commonwealth v. Smith, 797 N. E. 2d 380 (Mass. 2003) ..... 4

Crist v. Bretz, 437 U. S. 28, 57 L. Ed. 2d 24, 98 S. Ct. 2156 (1978) ..... 21

Ehlert v. United States, 402 U. S. 99, 28 L. Ed. 2d 625, 91 S. Ct. 1319 (1971) ..... 11, 12

Fong Foo v. United States, 369 U. S. 141, 7 L. Ed. 2d 629, 82 S. Ct. 671 (1962) ..... 8, 14, 21

Green v. United States, 355 U. S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957) ..... 6, 16, 19

Hiibel v. Sixth Judicial District Court, 542 U. S. __, 159 L. Ed. 2d 292, 124 S. Ct. 2451 (2004) ..... 18



Hudson v. United States, 522 U. S. 93, 139 L. Ed. 2d 450, 118 S. Ct. 488 (1997) ..... 16

Illinois v. Gates, 462 U. S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983) ..... 8

Jackson v. Virginia, 443 U. S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) ..... 22

Lee v. United States, 432 U. S. 23, 53 L. Ed. 2d 80, 97 S. Ct. 2141 (1977) ..... 15, 16

Lockhart v. Fretwell, 506 U. S. 364, 122 L. Ed. 2d 180, 113 S. Ct. 838 (1993) ..... 19

Mickens v. Taylor, 535 U. S. 162, 152 L. Ed. 2d 291, 122 S. Ct. 1237 (2002) ..... 19

Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) ..... 7

Pennsylvania Bd. of Probation and Parole v. Scott, 524 U. S. 357, 141 L. Ed. 2d 344, 118 S. Ct. 2014 (1998) ..... 18

Reed v. Farley, 512 U. S. 339, 129 L. Ed. 2d 277, 114 S. Ct. 2291 (1994) ..... 8

Sanabria v. United States, 437 U. S. 54, 57 L. Ed. 2d 43, 98 S. Ct. 2170 (1978) ..... 8, 15, 24

Serfass v. United States, 420 U. S. 377, 43 L. Ed. 2d 265, 95 S. Ct. 1055 (1975) ..... 23

Smalis v. Pennsylvania, 476 U. S. 140, 90 L. Ed. 2d 116, 106 S. Ct. 1745 (1986) ..... 7, 14, 15, 21, 24

State v. Bell, 322 N. W. 2d 93 (Iowa 1982) ..... 23

State v. Jones, 7 Ga. 422 (1849) ..... 25

Strickland v. Washington, 466 U. S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) ..... 8, 9, 18

Strunk v. United States, 412 U. S. 434, 37 L. Ed. 2d 56, 93 S. Ct. 2260 (1973) ..... 8

Swisher v. Brady, 438 U. S. 204, 57 L. Ed. 2d 705, 98 S. Ct. 2699 (1978) ..... 24

United States v. Anzalone, 886 F. 2d 229 (CA9 1989) ... 23

United States v. Dinitz, 424 U. S. 600, 47 L. Ed. 2d 267, 96 S. Ct. 1075 (1976) ..... 9, 17

United States v. Gearey, 368 F. 2d 144 (CA2 1966) ..... 11

United States v. Jenkins, 420 U. S. 358, 43 L. Ed. 2d 250, 95 S. Ct. 1006 (1975) ..... 11, 12, 24

United States v. Leon, 468 U. S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984) ..... 9

United States v. Love, 597 F. 2d 81 (CA6 1979) ..... 23

United States v. Martin Linen Supply Co., 430 U. S. 564, 51 L. Ed. 2d 642, 97 S. Ct. 1349 (1977) ..... Passim

United States v. Salvucci, 448 U. S. 83, 65 L. Ed. 2d 619, 100 S. Ct. 2547 (1980) ..... 19

United States v. Sanges, 144 U. S. 310, 36 L. Ed. 445, 12 S. Ct. 609 (1892) ..... 25

United States v. Scott, 437 U. S. 82, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978) ..... 6, 7, 10-12, 17, 20, 2[illegible]

United States v. Sisson, 399 U. S. 267, 26 L. Ed. 2d 608, 90 S. Ct. 2117 (1970) ..... 14



United States v. Tateo, 377 U. S. 463, 12 L. Ed. 2d 448, 84 S. Ct. 1587 (1964) ..... 9, 18

United States v. Wilson, 420 U. S. 332, 43 L. Ed. 2d 232, 95 S. Ct. 1013 (1975) ..... 6, 20

Wade v. Hunter, 336 U. S. 684, 93 L. Ed. 974, 69 S. Ct. 834 (1949) ..... 10, 12

Wright v. West, 505 U. S. 277, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992) ..... 22

**Rules of Court**

Fed. Rule App. Proc. 40 ..... 22

Fed. Rule Crim. Proc. 31(d) ..... 23

Supreme Court Rule 44 ..... 22

**State Statutes**

Mass. Gen. Laws Ann., ch. 140, § 121 ..... 3

Mass. Gen. Laws Ann., ch. 269, § 10(a) ..... 3

**Treatise**

4 W. Blackstone, Commentaries (1st ed. 1769) ..... 6

**Miscellaneous**

Office of Legal Policy, Report to the Attorney General on Double Jeopardy and Government Appeals of Acquittals (1987), reprinted in 22 U. Mich. J. L. Ref. 831 (1989) .. 6

Phillips, The Motion for Acquittal: A Neglected Safeguard, 70 Yale L. J. 1151 (1961) ..... 7

Sauber & Waldman, Unlimited Power: Rule 29(A) and the Unreviewability of Directed Judgments of Acquittal, 44 Am. U. L. Rev. 433 (1994) ..... 7

IN THE

# Supreme Court of the United States

---

MELVIN T. SMITH,

*Petitioner*,

*vs.*

COMMONWEALTH OF MASSACHUSETTS,

*Respondent*.

---

**BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT**

---

## INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Double Jeopardy Clause carries the risk of substantial unfairness to society. When its ultimate sanction of immunity from criminal liability protects an acquittal or similar dismissal based on a mistake of law, the defendant gains a windfall at the

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

expense of society's compelling interest in law enforcement. The present case involves an appropriate decision by the trial court to correct a legal mistake that improperly acquitted the defendant on the weapons charge. Reinstating the charge did no harm to any interest legitimately protected by the Clause, and upholding this decision will establish precedent that minimizes double jeopardy windfalls to undeserving defendants. This would preserve society's interest in prosecuting and convicting guilty criminals, which is consistent with the interests of justice and society that the CJLF was formed to protect.

## SUMMARY OF FACTS AND CASE

Felicia Brown lived in a three-story building in Boston with her mother, stepfather, and two siblings. See *Commonwealth* v. *Smith*, 788 N. E. 2d 977, 980 (Mass. App. 2003). Brown's family occupied the third floor and most of the second floor, while renting out the rest of the building to tenants. See *ibid.* On August 15, 1996, Christopher Robinson, Brown's cousin, spent the day at the Brown home drinking and smoking crack and marijuana. See *id.*, at 980-981. At around 4:00 a.m., he went from the third floor to the second floor to lie down. As "he reached the bottom of the stairs, he saw Brown and the defendant in Brown's bedroom." *Id.*, at 981. The defendant, Melvin Smith, held what looked like a .38 caliber pistol.

Robinson testified that as he went from the third to the second floor, Smith shot him three times. *Ibid.* Brown and Smith then left the house. Robinson sought help from Brown's stepfather, who called the police. See *ibid.* "The shooting severely injured Robinson and destroyed his digestive tract." *Ibid.* Brown identified Smith as the shooter from a "photograph array" in the hospital and at trial identified him as the shooter. See *ibid.*

Smith was charged with assault with intent to murder, assault and battery with a dangerous weapon, and unlawful



possession of a firearm, fourth offense. See *id.*, at 980. The firearm charge was under a Massachusetts law that makes knowing possession of a "firearm" illegal unless otherwise exempted. See Mass. Gen. Laws Ann., ch. 269, § 10(a) (West 2000). The relevant Massachusetts law defines "firearm" as "a pistol or revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and which the length of the barrel or barrels is less than 16 inches . . . ." Mass. Gen. Laws Ann., ch. 140, § 121 (West 2002). After the prosecution rested, the defense "moved for a required finding of not guilty on the charge of unlawful possession of a firearm, arguing that because the Commonwealth had not introduced direct evidence of the gun's length, the Commonwealth had not proved that the gun met the statutory definition of a firearm." *Smith*, 788 N. E. 2d, at 981. The judge granted the motion. While this was not told to the jury, it was entered on the docket. See *ibid.*

Later the same day, after the defense rested, but before closing argument, the prosecution brought to the trial court's attention a Massachusetts Supreme Judicial Court opinion holding "that testimony that a gun was a pistol or revolver was enough to permit a firearm charge to the jury." *Ibid.* Since the prosecution had submitted evidence conforming to this standard, the trial court then corrected its mistake and reinstated the firearm charge. See *id.*, at 981-982. "The docket reflects that the motion for required finding of not guilty had been reconsidered and denied." *Ibid.* The prosecution did not offer any additional evidence after the acquittal motion was denied, and the intermediate appellate court stated that "the defendant was provided the opportunity to reopen his case." *Id.*, at 983. The defendant was convicted on all charges. See *id.*, at 980.

The intermediate appellate court upheld the firearm conviction against the defendant's double jeopardy attack. See *id.*, at 982. It held that since the trial court's ruling did not require a second proceeding, double jeopardy was not violated. See *ibid.* The appellate court also held that the trial court had

the authority under Massachusetts law to reconsider its ruling on the defendant's motion, and that the defendant was not prejudiced by reinstating the firearm charge. See *id.*, at 982-983. The appellate court affirmed all the convictions. See *id.*, at 989.

The Massachusetts Supreme Judicial Court denied further appellate review. See *Commonwealth* v. *Smith*, 797 N. E. 2d 380 (2003) (table). This Court granted certiorari on June 14, 2004.

## SUMMARY OF ARGUMENT

Although the Double Jeopardy Clause has ancient roots, the realities of modern procedure have extended its reach far beyond its common law origins. This has led to a still developing body of law that can produce anomalous results. A particularly great problem with modern applications of the Clause is the potentially unfair granting of windfalls to undeserving defendants.

The Double Jeopardy Clause is the ultimate weapon in constitutional criminal procedure, as a successful claim immunizes the defendant from criminal liability. While there are many instances where this ultimate sanction is fair, it is unfair to the prosecution to free the defendant without any possibility of retrial due to the mistake of a third party such as the trial court. The Clause should be applied in a way to minimize these windfalls.

Windfalls can be reduced by limiting the Clause to cases where the interests it protects are clearly threatened. An interest-based approach is consistent with this Court's applications of the Clause and other areas of constitutional criminal procedure such as the Fourth Amendment and the right to effective assistance of counsel. Balancing societal and defendant interests also explains the significance of acquittals in double jeopardy jurisprudence. Limiting the Clause's protection to acquittals minimizes its costs to society while retaining most of its protection. A similar calculus should also be used in determining whether an action is an acquittal that is worthy of the Clause's protection.



The trial court's decision to reinstate the weapons charge did not threaten any of the defendant's double jeopardy interests in this case. Since this action occurred midtrial, and before the jury began deliberations, the defendant was not threatened with being worn down by the State's superior resources. The fact that trial counsel never asked to reopen the defense demonstrates that the defense to the weapons charge was not prejudiced by the ruling.

Nor did reinstating the weapons charge threaten the defendant's interests in finality. While double jeopardy protects acquittals, an acquittal does not warrant the Clause's protection until it is final. For example, this Court can reverse an appellate court's holding that there was insufficient evidence to convict, and a verdict of acquittal can be overturned by a jury poll. Similarly, an appellate court can use its power to rehear its own decisions to reverse an initial determination of insufficient evidence to convict. Since the trial court had the authority to reconsider its dismissal of the weapons charge under Massachusetts law, the reinstatement of the weapons charge was a simple exercise of a valid judicial power. Therefore, the initial dismissal was not final and did not warrant double jeopardy protection.

## ARGUMENT

### I. In its current form, the Double Jeopardy Clause can create windfalls for the defendant at the expense of society's compelling interest in punishing the clearly guilty.

This Court's interpretation of the Double Jeopardy Clause illustrates the problems with applying its common law princi-

ples to a very different modern setting. The Clause has ancient roots, but it now regulates a very different criminal justice system. Fitting this old guarantee to modern procedure can pose substantial problems to society and the justice system.

The common law development of double jeopardy began sometime in the thirteenth century. By the seventeenth century, it had evolved "into four common law pleas: autrefois acquit (former acquittal), autrefois convict (former conviction), autrefois attaint (former attainder), and pardon." See Office of Legal Policy, Report to the Attorney General on Double Jeopardy and Government Appeals of Acquittals (1987), reprinted in 22 U. Mich. J. L. Ref. 831, 843-844 (1989). The common law pleas were described in some detail by Blackstone. See 4 W. Blackstone, Commentaries 329-332 (1st ed. 1769). The Double Jeopardy Clause "tracked Blackstone's statement of the principles of *autrefois acquit* and *autrefois convict*," *United States* v. *Wilson*, 420 U. S. 332, 341-342 (1975), rooting the Clause in the common law pleas. See *United States* v. *Scott*, 437 U. S. 82, 87 (1978).

The purpose of the Clause is derived from its history.

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U. S. 184, 187-188 (1957); accord *Scott*, 437 U. S., at 87.

The history and purpose of the Clause have only limited use in its modern application. "These historical purposes are necessarily general in nature, and their application has come to abound in often subtle distinctions which cannot by any means all be traced to the original three common law pleas . . . ."



*Scott*, 437 U. S., at 87. The problem is that modern criminal procedure is radically different from criminal procedure at the common law or the founding. For example, the present case turns on the meaning of the trial court's response to the defendant's motion for a directed verdict at the close of the prosecution's evidence, a procedure that did not exist at either the common law or the founding. Directed verdicts first appeared in criminal cases in this country in the Civil War and Reconstruction era. See Phillips, The Motion for Acquittal: A Neglected Safeguard, 70 Yale L. J. 1151, 1152, n. 8 (1961); Sauber & Waldman, Unlimited Power: Rule 29(A) and the Unreviewability of Directed Judgments of Acquittal, 44 Am. U. L. Rev. 433, 439 (1994). It was not codified by Congress until the Criminal Appeals Act of March 2, 1907. See Sauber & Waldman, *supra*, at 440. Much of this Court's precedent on acquittals and double jeopardy concerns the prosecution's right to appeal when the case ends in something other than a judgment of guilt. See, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977); *Smalis* v. *Pennsylvania*, 476 U. S. 140 (1986). The right to appeal is also a relative latecomer to criminal procedure. The defendant had no right to appeal in criminal cases until the late nineteenth century, and the United States did not have a real right to appeal until 1971. See Sauber & Waldman, *supra*, at 441. The lack of government appeals stunted this Court's analysis of acquittals and their effects. See *Scott*, 437 U. S., at 89. This aspect of double jeopardy law did not begin to develop until Congress gave the United States full appellate rights in criminal cases in 1971 and the Double Jeopardy Clause was applied to the states in *Benton* v. *Maryland*, 395 U. S. 784, 796 (1969). This leaves a body of law not as well developed as that found in other constitutional rights.

Fitting this ancient right to modern criminal procedure is not always easy. The Double Jeopardy Clause is the ultimate weapon of the criminal defendant. While a successful appeal under other constitutional provisions such as the self-incrimination privilege, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966),

or the right to effective counsel, see *Strickland* v. *Washington*, 466 U. S. 668 (1984), may vacate the conviction, retrial is still allowed. The double jeopardy claim is one of the very few constitutional claims that, if successful, precludes retrial and ends any possibility of criminal liability.[2] This is a "drastic sanction" that is "rarely seen in criminal law, even for constitutional violations." *Reed* v. *Farley*, 512 U. S. 339, 368 (1994) (Blackmun, J., dissenting). This creates a fertile ground for injustice if improperly applied.

A fundamental principle of double jeopardy law is that an acquittal ends the prosecution, no matter how erroneous. Even if an acquittal is "based upon an egregiously erroneous foundation," the prosecution is over, with no chance of correction through appeal or retrial. See *Fong Foo* v. *United States*, 369 U. S. 141, 143 (1962) (*per curiam*); *Arizona* v. *Rumsey*, 467 U. S. 203, 211 (1984); *Sanabria* v. *United States*, 437 U. S. 54, 77-78 (1978). Similarly, double jeopardy jurisprudence gives "absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision . . . ." *Burks* v. *United States*, 437 U. S. 1, 16 (1978) (emphasis in original).

It can be unfair to society to lose forever the opportunity to convict and punish a wrongdoer because of a mistake that is not the prosecution's fault. Society has a compelling interest in catching, convicting, and punishing criminals. It is " '[t]he most basic function of any government' [ ] 'to provide for the security of the individual and of his property.' " *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983) (quoting *Miranda*, *supra*, at 539 (White, J., dissenting)). Trying and convicting criminals is essential to this compelling interest. "Corresponding to the right of the accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such

2. Other claims which preclude reprosecution are those involving the Sixth Amendment right to a speedy trial, see *Strunk* v. *United States*, 412 U. S. 434, 439-440 (1973), or successful Ex Post Facto or statute of limitation claims.



a trial." *United States* v. *Tateo*, 377 U. S. 463, 466 (1964). The Double Jeopardy Clause's bar to retrial frustrates society's right to protect itself and obtain an accurate determination of the defendant's guilt. While "the Constitution conclusively presumes" that placing the defendant twice in jeopardy is unfair, see *Arizona* v. *Washington*, 434 U. S. 497, 503 (1978), it is no less true that the Clause can create results that are unfair to the state and unjust to society.

In most circumstances, applying the Double Jeopardy Clause to bar retrial causes no injustice. In a trial free of erroneous and prejudicial rulings against the prosecution, society's interest in reviewing an acquittal is outweighed by the interests protected by the Clause. Similarly, when the prosecution's actions are intended to provoke a mistrial in order to harass the defendant through multiple prosecutions, see *United States* v. *Dinitz*, 424 U. S. 600, 611 (1976), any legitimate interest in retrial is forfeited by the prosecution's bad faith.

Double jeopardy creates a windfall for the defendant when the acquittal comes from a mistake by the trial court. When the prosecution's case is compromised by the improper exclusion of evidence during the trial, or an erroneous definition of the offense leads to an incorrect directed verdict, the people are deprived of their day in court. Since double jeopardy precludes review of acquittals, see *Martin Linen*, 430 U. S., at 571, there is no chance to correct the error. Although this result may be compelled by the Double Jeopardy Clause, it is still unfair to the public interest.

In other areas of constitutional law, errors not attributable to the police or the prosecution will not justify overturning the conviction. For example, the Fourth Amendment exclusionary rule does not apply when officers rely in good faith on the magistrate's mistaken issuance of a search warrant. See *United States* v. *Leon*, 468 U. S. 897, 921 (1984). It is also true that the prosecution is penalized for the mistakes of others in ineffective assistance of counsel cases, see *Strickland*, 466 U. S., at 686, but even there the prosecution still retains the

opportunity to retry the defendant. Only double jeopardy can end a prosecution due to the mistake of the trial court.

Although a trial court's mistake cannot by itself change the result under the Double Jeopardy Clause, the extraordinary cost of a successful invocation of the Clause should inform this Court's analysis. Fortunately, double jeopardy jurisprudence is not formulaic, and there is a way to minimize the Clause's cost while retaining its essential protection.

## II. The Double Jeopardy Clause should only apply when the interests it protects are clearly threatened.

The Double Jeopardy Clause is not absolute. There are times when "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interests in fair trials designed to end in just judgments." *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949). Since the Clause now extends to situations not covered by its common law origins, see *supra*, at 7, it should be applied more flexibly. This Court's decisions demonstrate that the Clause's modern application can accommodate other needs.

*United States* v. *Scott*, 437 U. S. 82 (1978) demonstrates this principle. At the close of evidence, the trial court granted the defendant's motion to dismiss two counts of the indictment due to prejudicial preindictment delay. See *id.*, at 84. The government's appeal was dismissed by the Court of Appeals on double jeopardy grounds. *Ibid.* This Court held that Double Jeopardy did not bar the government's appeal. See *id.*, at 101.

While the principles of double jeopardy counsel that the state should not be allowed to use its superior resources to grind down the defendant through repeated retrial, see *id.*, at 95, this did not extend to situations where the defendant is responsible for the termination of the charges. In that case, it "is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at



least insisted on having the issue of guilt submitted to the first trier of fact." *Ibid.* Instead, the defendant chose "to avoid conviction and imprisonment" by advancing "a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt." *Ibid.*

Given the extreme consequences of a successful double jeopardy defense, it must be clear that the case ended in an acquittal before applying the Clause's absolute protection. If the Double Jeopardy Clause was applied to Scott's case, then "only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.' " *Id.*, at 100 (quoting *Arizona* v. *Washington*, 434 U. S. 497, 509 (1978)). Since no interest protected by the Double Jeopardy Clause was compromised by the appeal, see *ibid.*, double jeopardy does not bar the government's appeal "where the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence . . . ." *Id.*, at 101.

*Scott* partially overruled *United States* v. *Jenkins*, 420 U. S. 358 (1975). See 437 U. S., at 101. *Jenkins* involved a bench trial in which the trial court " 'dismissed' the indictment and 'discharged' the respondent" at the conclusion of the trial. See 420 U. S., at 359. The defendant had been indicted for " 'knowingly refusing and failing to submit to induction into the armed forces of the United States.' " *Ibid.* He moved for acquittal based on *United States* v. *Gearey*, 368 F. 2d 144 (CA2 1966), which held that an induction order was invalid if the draft board did not postpone the order until it resolved the registrant's conscientious objector claim. See 420 U. S., at 361. *Gearey* also held that the local board must reopen the registrant's classification if "the registrant's conscientious objector views had ripened only after he had been notified to report for induction." *Id.*, at 361-362. *Gearey* was the law of the circuit when Jenkins was ordered to report, but was overturned two months later in *Ehlert* v. *United States*, 402 U. S. 99 (1971).

See 420 U. S., at 362. The District Court held that *Gearey* applied to Jenkins' case, since applying *Ehlert* would be unfair. See *ibid.* In *Jenkins*, this Court addressed whether the government could appeal the District Court's decision. See *id.*, at 360.

In the context of jury trials, differentiating between the verdict and the court's rulings of law is easy. *Id.*, at 366. However, in bench trials, these decisions are potentially much harder to separate. See *id.*, at 367. It was unclear in *Jenkins* whether the District Court's ruling resolved any or all issues of fact in the defendant's favor. See *ibid.* In this situation, a successful government appeal would not reinstate a finding of guilt since "there was no such finding, in form or substance, to reinstate." *Id.*, at 368. The rule "that the Double Jeopardy Clause does not bar an appeal when errors of law may be corrected and the result of such correction will simply be reinstatement of a jury's verdict of guilty or a judge's finding of guilt" did not apply in *Jenkins* "because of the uncertainty as to the basis of the District Court's actions here . . . ." *Ibid.* Since there was no other valid reason for allowing the appeal, it was barred by double jeopardy. See *id.*, at 370.

*Scott* overruled *Jenkins* to the extent that it prevented the government from appealing a midtrial dismissal that was sought by the defendant and was unrelated to guilt or innocence. See 437 U. S., at 101. While this does not specifically reject *Jenkins*' approach to cases where the existence of an acquittal is unclear, *Scott* also disapproved of *Jenkins*' general approach to the Double Jeopardy Clause. It found that the general principle of double jeopardy cited in *Jenkins*, "is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecution." *Id.*, at 95-96. Similarly, "we believed we pressed too far in *Jenkins* the concept of the 'defendant's valued right to have his trial completed by a particular tribunal.' " *Id.*, at 100-101 (quoting *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949)). *Jenkins* had to be set aside because it expanded double jeopardy too far. The



Clause should apply only where its interests are clearly threatened, which was not the case in *Scott*.

This Court's other double jeopardy cases reflect similar caution, invoking the Clause where the threat to the defendant's interests is clear, but not applying it where there is no such threat. In *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977), the jury was discharged after seven days of deadlock, and six days later a timely motion for acquittal was filed. See *id.*, at 566. Two months after that, the motion was granted. See *ibid.* The question was whether double jeopardy prevented an appeal of these orders, to which this Court answered "yes." See *id.*, at 567. *Martin Linen* addressed the "heart of [double jeopardy] policy . . . the concern that permitting the sovereign freely to subject the citizen to a second trial to a same offense would arm the Government with a potent instrument of oppression." *Id.*, at 569.

In order for double jeopardy to apply, the defendant had to meet two threshold conditions. First, the defendant must have been placed in jeopardy, and second, the government appeal must threaten successive prosecutions. See *id.*, at 569-570. Since there would be new proceedings if the government's appeal succeeded, see *id.*, at 570, it was necessary to "inquire further into the constitutional significance of a Rule 29(c) acquittal." *Id.*, at 571.

The constitutional effect of the District Court's actions was clear. It was an acquittal in both form and substance. *Id.*, at 571-572. The existence of an acquittal turns on whether the court's action "whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.*, at 571. Here "it is plain" that the trial court considered the evidence and determined that "it was legally insufficient to sustain a conviction." *Id.*, at 572. Therefore double jeopardy barred the appeal.

The United States argued that only an acquittal verdict by a jury warranted double jeopardy protection. See *ibid.* Since

directed verdicts of acquittal were given double jeopardy protection, see *Fong Foo* v. *United States*, 369 U. S. 141, 142-143 (1962) (*per curiam*), this argument was inherently untenable. The government attempted to distinguish *Fong Foo* by noting that in that case the jury was directed to submit an acquittal. See *Martin Linen*, 430 U. S., at 573. Formalities like this did not govern the Clause. What mattered was the effect of the order on the interests protected by the Double Jeopardy Clause. It was an acquittal which must be protected under double jeopardy. Something as trivial as the timing of this final order, see *ibid.*, was irrelevant. If the government's appeal succeeded, the defendants would be tried again even though the trial court had held that the government had failed to carry its burden of proof and entered a final order dismissing the case. If this order could not be respected under double jeopardy, then there would be no reason to accord any respect to acquittals in bench trials or directed verdicts of acquittals. Since judges have the same power to acquit as juries, see *United States* v. *Sisson*, 399 U. S. 267, 290 (1970), barring the government's appeal was inevitable in *Martin Linen*.

*Smalis* v. *Pennsylvania*, 476 U. S. 140 (1986) involved a similarly clear threat to the interests preserved by double jeopardy. At the close of the prosecution's case, the trial court "dismissed certain charges against petitioners on the ground that the evidence presented was legally insufficient to support a conviction." *Id.*, at 141. The case was a bench trial, and the trial court dismissed those charges on the defendants' demurrer. See *id.*, at 141-142. The Pennsylvania Supreme Court held that this order was reviewable on appeal since a demurrer is a legal ruling rather than a finding of fact. See *id.*, at 142-143. Once again, the case for applying double jeopardy was clear. A ruling that as a matter of law the evidence is insufficient to support a conviction was long considered an acquittal. See *id.*, at 144. A successful appeal by the government would subject the defendant to post-acquittal factfinding. Since this would frustrate the defendant's interest "in having an end to the



proceedings against him," *id.*, at 145, double jeopardy precluded the appeal of the demurrer. See *id.*, at 145-146.

Other findings of double jeopardy violations by this Court are also based on clear threats to the basic interests protected by the Clause. *Sanabria* v. *United States*, 437 U. S. 54 (1978) held that a government appeal from a midtrial exclusion of evidence and subsequent acquittal was barred by double jeopardy. See *id.*, at 56, 62. Although the exclusionary ruling was erroneous and led to the acquittal, allowing an appeal of this ruling would compromise double jeopardy principles. See *id.*, at 78. The government conceded this basic point, only disputing whether it could retry the defendant on a different theory of liability. See *id.*, at 64-65. In essence, the government argued that dismissing one theory of liability was "as if the Government charged the crime in two counts and the District Court had dismissed [one] count." *Id.*, at 65. The fatal problem with this argument is that the government did not charge two separate counts on two separate theories of liability. Only one count was charged in the indictment, and it was terminated by the District Court's acquittal. See *id.*, at 66-67. Subjecting the defendant to a new trial for the same offense, but on a different theory of liability unacceptably gives a second bite at the apple to the prosecution, thus undercutting the adversarial system. See *id.*, at 78.

The fact that double jeopardy does not apply where these basic interests are not threatened is further demonstrated in *Lee* v. *United States*, 432 U. S. 23 (1977). The defendant was charged with stealing two billfolds from a post office concessionaire. See *id.*, at 24-25. The relevant statute "require[d] proof that the theft be committed knowingly and with intent to deprive the victim of his property." *Id.*, at 25. The information did not contain any allegation of knowledge or intent, which the defendant pointed out to the trial court in a motion to dismiss the information. This motion was made after the prosecutor's opening statement. See *ibid.* The District Court tentatively denied the motion, and the defendant did not object to going

forward with the trial, so long as the District Court continued to study the motion to dismiss. See *id.*, at 26. At the end of the Government's case, the defendant moved for acquittal. See *ibid.* The defendant then rested without presenting any evidence and the District Court considered the two motions. It dismissed the acquittal motion, finding that the Government had proven specific intent, but granted the motion to dismiss because of the failure to charge knowledge or intent in the information. *Id.*, at 26-27. Lee was indicted and retried, *id.*, at 27, and this Court held that double jeopardy did not bar a second trial. *Id.*, at 34.

The defendant claimed that he never should have been tried in the first place, and that once tried he had a right to a final determination of guilt or innocence by the jury. See *id.*, at 27. This was untenable. As the Government pointed out, the defendant invited this situation by filing the motion at the last minute and allowing jeopardy to attach before a final ruling. See *id.*, at 28. In this situation, the interests protected by the Double Jeopardy Clause did not bar retrial. See *id.*, at 33-34.

A "bedrock" of the Double Jeopardy Clause is the defendant's interest in finality. See *Hudson* v. *United States*, 522 U. S. 93, 111 (1997) (Stevens, J., concurring in the judgment). The proceedings against the defendant must end at some point in order to prevent the government from prevailing due to attrition rather than proof. See *Green* v. *United States*, 355 U. S. 184, 187-188 (1957). This protection is necessary in order to prevent the Government from convicting the defendant through the brute force of its vastly superior resources. See *ibid.* Yet even this "bedrock" principle has its limits. As noted in this brief, there are many instances in which the government can retry the defendant even though jeopardy had already attached. Successful defense appeals unrelated to proof of guilt, dismissal of indictments or information, and most mistrials are a few examples. In theory, the Government has the right to retry the defendant an unlimited number of times so long as the reason for terminating the trial is not an acquittal or



its functional equivalent.[3] A defendant in this situation could be worn down by retrial just as effectively as if the Government could retry acquittals.

This Court's precedents draw a line between prosecutions ending in acquittals and those ending for other reasons, giving acquittals a "particular significance . . . ." *Scott*, 437 U. S., at 91. While the effect of a retrial on the defendant is the same in both cases, only acquittals are considered final under double jeopardy. In part, this reflects the Clause's roots in the common law plea of prior acquittal. This can only be a partial explanation, however, because criminal procedure and the scope of double jeopardy's protection have greatly expanded beyond the Clause's roots. Cf. *id.*, at 87 (noting the expansion of criminal procedure since the common law and a modern double jeopardy jurisprudence removed from the common law pleas). Nor is it enough to say that by achieving a verdict of acquittal, the defendant has "won" the case. Guilty verdicts do not end the case as they are subject to appeal by the defendant, and the government may appeal adverse final orders that are not equivalent to acquittals. See *Scott*, *supra*, at 101. Acquittals are the only final orders that cannot be appealed by the losing party.

The distinction between acquittals and orders which end the trial but allow retrial is based on necessity. Preventing retrial whenever the defendant prevails is simply too expensive to justice and society. The people have a right to their day in court and an opportunity to convict the defendant. See *id.*, at 100. "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings

---

3. If a mistrial is declared due to an error "motivated by bad faith or undertaken to harass or prejudice," then retrial is barred by double jeopardy. See *United States* v. *Dinitz*, 424 U. S. 600, 611 (1976). Therefore a prosecutor could not provoke a mistrial through error intended to wear down the defendant through repeated retrial.

leading to conviction." *United States* v. *Tateo*, 377 U. S. 463, 466 (1964).

Limiting double jeopardy to acquittals pays respect to the Clause's common law roots, and maximizes its utility to society. Since a primary purpose of the Clause is protecting the innocent, it makes sense to limit its protections to those most likely to be innocent, the acquitted. By concentrating its powerful benefits on the most deserving, double jeopardy's costs are reduced while maintaining most of its benefits.

This approach should also be applied to the definition of acquittal. While this Court's cases show that in most cases it is relatively simple to determine whether there is an acquittal, see *supra*, at 10-18, more difficult cases do happen. In those cases, double jeopardy should not apply unless the case for its application is clear. If it is unclear whether the interests protected by double jeopardy are threatened by the action in question, then the Clause's extraordinary sanction should not apply.

It is entirely proper to consider the costs of applying a constitutional provision as a factor in determining the relevant standard. Cost-benefit analysis is most explicit in Fourth Amendment decisions determining the reasonableness of a search or seizure. See *Hiibel* v. *Sixth Judicial District Court*, 542 U. S. __, 159 L. Ed. 2d 292, 304, 124 S. Ct. 2451, 2459 (2004). Similarly, the extraordinary remedy of the exclusionary rule is not applied when its costs exceed its benefits. See *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 363 (1998). Practical considerations also inform the test for determining ineffective assistance of counsel. An important consideration in the creation of this standard was to prevent an excessively intensive inquiry into defense counsel's conduct from harming counsel's performance or willingness to represent criminal defendants. See *Strickland* v. *Washington*, 466 U. S. 668, 690 (1984). Therefore, the *Strickland* standard was "highly deferential" to defense counsel's conduct of the defense. See *id.*, at 689.



While the Constitution does not bend and sway with every societal need, practical considerations are relevant to constitutional standards. An important consideration in administering constitutional criminal procedure is keeping criminal defendants from benefitting from undeserved windfalls. See, *e.g.*, *United States* v. *Salvucci*, 448 U. S. 83, 95 (1980); *Mickens* v. *Taylor*, 535 U. S. 162, 173 (2002); *Lockhqrt* v. *Fretwell*, 506 U. S. 364, 366 (1993). Applying double jeopardy's absolute prohibition against retrial in cases where its need is not clear is a windfall to the lucky defendants. Limiting double jeopardy to cases where it is unquestionably necessary appropriately keeps defendants from getting windfalls while retaining the essential benefits of the Clause.

## III. There is no threat to the interests protected by the Double Jeopardy Clause that justifies invoking the Clause in this case.

The trial court's action did not threaten any of the defendant's double jeopardy interests in this case. The trial court's first ruling mistakenly concluded that the People, as a matter of law, had not proven the firearms offense. It then corrected this mistake before the case was submitted to the jury. See *supra*, at 3. While the defendant was briefly "freed" from the weapons charge, the trial court's mistake and decision to correct it did not influence the jury or adversely affect the defense. There is no reason to believe that the defendant was in any way prejudiced by the trial court's actions.

The primary interests protected by the Clause are set forth in the famous passage from *Green* v. *United States*, 355 U. S. 184, 187-188 (1957), quoted *supra*, at 6. Upholding the trial court's action in this case will not give the government a tool "to make repeated attempts to convict an individual for an alleged offense . . . ." *Id.*, at 187. Most importantly, the trial court's decision did not give the prosecution another bite at the apple. While the prosecution was able to convince the trial

court that its legal ruling was incorrect, the trial court's action did not allow the government to reprove its case. A procedure is less likely to violate double jeopardy if it does not require additional factfinding. For example, if a government appeal does not threaten a successive prosecution, then it is not barred by double jeopardy. See *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 569-570 (1977). As this Court noted in the context of the Government's right to appeal, "where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." *United States* v. *Wilson*, 420 U. S. 332, 344 (1975) (footnote omitted).

In *Wilson*, the District Court dismissed the indictment for prejudicial delay after the jury returned a guilty verdict. See *id.*, at 333. Double jeopardy did not bar an appeal of this ruling. See *ibid.*

> "Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing exposure and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *Id.*, at 345 (footnote omitted).

Similarly, the trial court's decision in this case did not require a new jury to be empaneled or new proof to be heard. While the defendant was now exposed to liability on the gun charge, his defense to that claim was not prejudiced. "This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact." *United States* v. *Scott*, 437 U. S. 82, 96 (1978).

It is possible that an action terminating the prosecution may be protected under double jeopardy even when reversing the action would not require new factfinding. In *Martin Linen*, this Court was adamant that the timing of an order was irrelevant to whether double jeopardy made the order unreviewable. See



430 U. S., at 573-575. It could be argued that this principle and the "particular significance" that the law attaches to acquittals, see *Scott*, 437 U. S., at 91, could render a judicially ordered acquittal issued after a guilty verdict immune to review. This hypothetical does not change the analysis here, and the question need not be resolved to decide this case.

The hypothetical above addresses finality, the other main interest protected by double jeopardy. A "primary purpose" of the Double Jeopardy Clause is to "preserve the finality of judgments." *Crist* v. *Bretz*, 437 U. S. 28, 33 (1978). In the hypothetical, the judge's order would be considered final and it could be argued that the defendant should be allowed to rely on it. Therefore, double jeopardy would protect the integrity of a judgment of acquittal that is meant to be final.

The present case does not raise such finality issues. In order for an action to be deemed an acquittal under double jeopardy, it first must be final. This can be an acquittal order entered after a hung jury is discharged, see *Martin Linen*, 430 U. S., at 565-566, an order directing a verdict of acquittal at the conclusion of the prosecution's case, see *Fong Foo* v. *United States*, 369 U. S. 141, 142-143 (1962) (*per curiam*), or dismissing some charges as unsupported by the evidence at the end of the prosecution's case and holding the other charges in abeyance pending appeal of the demurrer. See *Smalis* v. *Pennsylvania*, 476 U. S. 140, 141-142 (1986); see also *Commonwealth* v. *Smalis*, 480 A. 2d 1046, 1048, n. 1 (Pa. Super. 1984). In these cases the action deemed an acquittal effectively ended the prosecution with respect to the dismissed charges. While this is most evident in *Martin Linen* and *Fong Foo* it is also true in the unusual facts of *Smalis*, as the trial court's decision to hold the other changes in abeyance pending the appeal of the demurrer demonstrates that the demurrer was final with respect to those dismissed charges.

The trial court's actions in this case show that the initial dismissal of the gun charge was not a final judgment that warrants double jeopardy protection. The decision to correct

the legal error underlying the initial dismissal is no different than a court granting a motion to reconsider and reversing its initial ruling. Double Jeopardy should not prevent a court from reconsidering a ruling, so long as the initial ruling is not yet final.

Appellate procedure helps demonstrate this principle. This Court and the federal circuit courts have the jurisdiction to reconsider their rulings upon a timely motion for rehearing. See Supreme Court Rule 44; Fed. Rule App. Proc. 40. When an appellate or habeas court rules that the evidence was constitutionally insufficient to convict, see *Jackson* v. *Virginia*, 443 U. S. 307, 324 (1979), double jeopardy precludes retrial. See *Burks* v. *United States*, 437 U. S. 1, 18 (1978). While such rulings preclude retrial, double jeopardy does not prevent this Court or a federal circuit court from reversing an initial ruling of insufficient evidence to convict after a timely motion to rehear. Similarly, a federal circuit court's finding of insufficient evidence does not preclude review of that decision by this Court. When this Court overruled a federal circuit court for improperly granting habeas under *Jackson*, see *Wright* v. *West*, 505 U. S. 277, 295-297 (1992) (plurality opinion), double jeopardy was not even mentioned. While an acquittal is constitutionally significant under double jeopardy, it is only significant when it is final. The trial court in this case should be similarly unconstrained by double jeopardy to reconsider its initial incorrect decision on the sufficiency of the evidence.

The trial court's actions in this case indicate that it did not consider its initial action to be final. It is true that how a court labels its action is irrelevant to the double jeopardy analysis. See *Martin Linen*, 430 U. S., at 571. However, whether the trial court treated its first decision as final is relevant to whether that decision was in fact final. The initial dismissal was not final under Massachusetts procedure, since a Massachusetts judge has the power to reconsider the decision while the case is pending. See *Commonwealth* v. *Smith*, 788 N. E. 2d 977, 983 (Mass. App. Ct. 2003). As the dismissal of the weapons charge



was reversed before the case was submitted to the jury, this decision was not final for the purpose of double jeopardy. Nor is this an attempt to manipulate procedural rules in order to avoid the Double Jeopardy Clause. For example, a state ruling declaring that acquittals are not final until reviewed by an appellate court would violate double jeopardy. Allowing a court to review its own ruling is a traditional practice that does not violate the Clause.

The fact that this initial ruling would be considered an acquittal, had it not been reconsidered by the same court, is thus irrelevant to the double jeopardy analysis. The term "acquittal" "has no talismanic quality for purposes of the Double Jeopardy Clause." *Serfass* v. *United States*, 420 U. S. 377, 392 (1975).

> "[W]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action. [Citations.] Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a *resolution*, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U. S., at 571 (emphasis added).

Just as a judge can reconsider a dismissal of a charge, a jury can reconsider an acquittal until the verdict is final. The Federal Rules of Criminal Procedure allow the jury to be polled after a verdict is returned. See Fed. Rule Crim. Proc. 31(d). This procedure is not limited to guilty verdicts. "After a *verdict* is returned but before the jury is discharged, the court must on a *party's* request, or may on its own, poll the jurors individually." *Ibid.* (emphasis added). If the jury is polled after an acquittal is announced and a juror disagrees with the not guilty verdict, double jeopardy does not bar retrial because the acquittal was not final. See *United States* v. *Love*, 597 F. 2d 81, 85-86 (CA6 1979); *United States* v. *Anzalone*, 886 F. 2d 229, 230-231 (CA9 1989); *State* v. *Bell*, 322 N. W. 2d 93, 95-96 (Iowa 1982). No order or verdict is recognized under double jeopardy until it is final. Since the trial court's initial order was not final, the decision to reinstate the weapons charge did not violate double jeopardy.

The defendant's arguments do not address this central issue. His assertion that *United States* v. *Jenkins*, 420 U. S. 358 (1975) and *Swisher* v. *Brady*, 438 U. S. 204 (1978) prevent supplemental findings after a "true acquittal," see Pet. Brief 25, ignores finality. In *Jenkins*, the acquittal was the clearly final order of the District Court discharging the defendant after a bench trial, see 420 U. S., at 359. *Swisher* supports the state's position in this case. In *Swisher*, the special master's hearing and the reconsideration by the judge were a single proceeding which did not violate double jeopardy, 438 U. S., at 215-216, just as the consideration and reconsideration of a motion by the judge in this case did not.

Other assertions by the defendant are similarly irrelevant in the context of this case. He claims that once a judge or jury "truly acquits" the defendant, further government attempts to convict the defendant are forbidden no matter what form they take. See Pet. Brief 31. He cites *United States* v. *Jenkins*, *Smalis* v. *Pennsylvania*, 476 U. S. 140 (1986); *Burks* v. *United States*, 437 U. S. 1 (1978), and *Sanabria* v. *United States*, 437 U. S. 54 (1978) for this point. See Pet. Brief 31. Like *Jenkins*, *Smalis*, *Sanabria*, and *Burks* all involve unquestionably final acquittals. See *Smalis*, *supra*, at 141-142 (appeal, dismissal of prosecution on the ground that the evidence is legally insufficient to support prosecution done at the end of a bench trial); *Sanabria*, *supra*, at 56, 62 (appeal of midtrial exclusion of evidence and subsequent acquittal); *Burks*, *supra*, at 2 (attempted to retry after appellate reversal for insufficient evidence to convict). These cases involve attempts to get another court to reopen a final order acquitting the defendant, which makes them inapplicable to this case.

Similarly, *Burks* cannot support the defendant's remarkable assertion that double jeopardy bars the trial court's power to rehear a case. See Pet. Brief 32. *Burks*' holding that double jeopardy prevents a retrial after an appellate acquittal is not relevant to this point. The defendant's other support for his claim that there is "no constitutional, statutory, or common law



power to rehear an acquittal," Pet. Brief 32, citing *United States* v. *Sanges*, 144 U. S. 310, 315 (1892), is no better. *Sanges* addressed whether there was appellate jurisdiction over a government appeal of an order quashing an indictment. See *id.*, at 310-311. That case was decided before Congress generally authorized government appeals in criminal cases, and this Court held that there was no jurisdiction to hear an appeal in a criminal case. See *id.*, at 323. The passage cited by the defendant is a long quotation from *State* v. *Jones*, 7 Ga. 422, 424, 425 (1849); see *Sanges*, *supra*, at 315. Its denial of a right to rehearing is made in the context of final orders. "If the effect of the judgment is a discharge, then there can be no rehearing, *either by a new trial or writ of error*." *Sanges*, *supra*, at 315 (emphasis added) (internal quotation marks omitted). Even this relic from the prehistory of government appeals in criminal cases cannot support the defendant.

Nor can the defendant claim that he was prejudiced by this ruling. The Massachusetts appellate court held that the defendant was given the option to reopen the defense after the gun charge was reinstated, but declined the offer. See *Smith*, 788 N. E. 2d, at 983. The defendant asserts that the transcript conclusively demonstrates that Smith "was *not* 'provided the opportunity to reopen' in the wake of the judge's reconsideration" of the dismissal of the gun charge. See Pet. Brief 34 (emphasis in original). Since the trial court denied the prosecution's motion to reopen after its initial dismissal of the weapons charge, see J. A. 21-22, the defendant claims that he had no chance to reopen the case after the trial court reinstated the charge. See Pet. Brief 34. This assertion overlooks the fact that Smith never asked the trial court to reopen his case. In his two efforts to get the trial court to reverse its decision reinstating the weapons charge, he never asked to reopen the case, and did not indicate that his defense to this charge had been compromised. After the trial court reinstated the charges, defense counsel wished to argue other reasons for dismissal contained in his motion to dismiss, see J. A. 75-76, and the trial court responded by denying the motion to dismiss. See *id.*, at

76. There was no request to reopen the case. The defense's subsequent request for the trial court to reconsider argued that the prosecution had not, as a matter of law, carried its burden of proving the weapons charge, but did not ask to reopen the defense or indicate that it was prejudiced by the reinstatement of the charge. See *id.*, at 81-82. Any claim of prejudice was waived by trial counsel.

The trial court's first order did not resolve the case in the defendant's favor because it was not final. This trial court's actions did not threaten either the defendant's interest in finality or in avoiding retrial. Since there is no clear threat to either interest, the extraordinary remedy of the Double Jeopardy Clause should not be applied to immunize the defendant from a charge of which he is clearly guilty.

## CONCLUSION

The decision of the Appeals Court of Massachusetts should be affirmed.

November, 2004

Respectfully submitted,

CHARLES L. HOBSON

*Attorney for Amicus Curiae*
*Criminal Justice Legal Foundation*

FOR ARGUMENT

No. 03-8661

Supreme Court, U.S.
FILED
OCT 29 2004
OFFICE OF THE CLERK

# In The Supreme Court of the United States

MELVIN T. SMITH,

*Petitioner,*

v.

THE COMMONWEALTH OF MASSACHUSETTS,

*Respondent.*

**On Writ Of Certiorari To The Appeals Court Of The Commonwealth Of Massachusetts**

## BRIEF OF *AMICI CURIAE* STATES OF IDAHO, ALABAMA, ALASKA, ARIZONA, DELAWARE, HAWAII, ILLINOIS, IOWA, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, UTAH, VERMONT, VIRGINIA, AND WEST VIRGINIA IN SUPPORT OF RESPONDENT

LAWRENCE G. WASDEN
Idaho Attorney General

KENNETH K. JORGENSEN*
LORI A. FLEMING
JESSICA M. BORUP
Deputy Idaho Attorneys General

P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

**Counsel of Record*

[Additional *Amici* Listed Inside]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TROY KING
Alabama Attorney General
Alabama Statehouse
11 South Union St., Third Floor
Montgomery, AL 36130
(334) 242-7300

GREGG D. RENKES
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811-0300
(907) 465-2133
(907) 465-2075 (fax)

TERRY GODDARD
Arizona Attorney General
Department of Law
1275 West Washington St.
Phoenix, AZ 85007
(602) 542-5025
(602) 542-4085 (fax)

M. JANE BRADY
Attorney General of Delaware
Department of Justice
820 N. French St.
Wilmington, DE 19801
(302) 577-8400

MARK J. BENNETT
Attorney General of Hawaii
425 Queen St.
Honolulu, HI 96813
(808) 586-1500

LISA MADIGAN
Attorney General of Illinois
Office of the Illinois
Attorney General
100 West Randolph Street,
12th Floor
Chicago, IL 60601
(312) 814-3698
(312) 814-5024 (fax)

TOM MILLER
Iowa Attorney General
1305 E. Walnut St.
Des Moines, IA 50319
(515) 281-5164
(515) 281-4209 (fax)

MIKE MCGRATH
Attorney General
State of Montana
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

JON BRUNING
Attorney General
of Nebraska
Office of the Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682
(402) 471-3297 (fax)

BRIAN SANDOVAL
Attorney General
Nevada Department
of Justice
100 North Carson Street
Carson City, NV 89701-4717
(775) 684-1100

KELLY A. AYOTTE
Attorney General
New Hampshire
Department of Justice
33 Capitol Street
Concord, NH 03301
(603) 271-3658

WAYNE STENEHJEM
Attorney General
of North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505-0040
(701) 328-2210
(701 328-2226 (fax)

JIM PETRO
Ohio Attorney General
State Office Tower
30 E. Broad Street 17th Floor
Columbus, OH 43215-3428
(614) 466-4320

W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard,
Suite 112
Oklahoma City, OK
73105-4894
(405) 521-3921

HARDY MYERS
State of Oregon
Attorney General
1162 Court St. N.E.
Salem, OR 97301
(503) 378-4400

GERALD J. PAPPERT
Attorney General
Commonwealth of
Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

PATRICK C. LYNCH
Rhode Island Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT
84114-2320
(801) 538-9600

WILLIAM H. SORRELL
Attorney General,
State of Vermont
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

JERRY W. KILGORE
Attorney General of Virginia
William E. Thro
State Solicitor General
Office of the
Attorney General
900 East Main Street
Richmond, VA 23219
(804) 786-2436
(804) 786-1991 (fax)

DARRELL V. MCGRAW, JR.
Attorney General
of West Virginia
Office of the
Attorney General
State Capitol, Room 26-E
Charleston, WV 25305
(304) 558-2021

TABLE OF CONTENTS


| | Page |
|---|---|
| Statement of *Amici Curiae* Interest | 1 |
| Summary of the Argument | 1 |
| Argument | 2 |
| I. The Double Jeopardy Clause is not Offended where a Trial Court Reconsiders an Erroneous Ruling that the Evidence is Insufficient Prior to Terminating the Trial Itself | 2 |
| II. Allowing Reconsideration of Erroneous Rulings on the Sufficiency of the Evidence Before the Termination of Trial Will Promote Uniformity of Application of Double Jeopardy Principles Among States with Different Procedural Rules | 9 |
| Conclusion | 12 |

## TABLE OF AUTHORITIES

Page

CASES

*Arizona v. Rumsey*, 467 U.S. 203 (1984) ..... 7

*Arizona v. Washington*, 434 U.S. 497 (1978) ..... 8

*Commonwealth v. Smith*, 788 N.E.2d 977 (Mass. App. 2003) ..... 1

*North Carolina v. Pearce*, 395 U.S. 711 (1969) ..... 2

*Ohio v. Johnson*, 467 U.S. 493 (1984) ..... 8

*Richardson v. United States*, 468 U.S. 317 (1984) ..... 8

*Schiro v. Farley*, 510 U.S. 222 (1994) ..... 2

*Smalis v. Pennsylvania*, 476 U.S. 140 (1986) ..... 3, 6, 7

*United States v. DiFrancesco*, 449 U.S. 117 (1980) ..... 2

*United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) ..... 5, 6, 7

*United States v. Scott*, 437 U.S. 82 (1978) ..... 8

*United States v. Wilson*, 420 U.S. 332 (1975) ..... 3, 4, 6

STATE RULES OF PROCEDURE

Alabama R.Crim.P. 20.2 ..... 10

Alaska R.Crim.P. 29 ..... 9

Arizona R.Crim.P. 20 ..... 10

Colorado R.Crim.P. 29 ..... 10

Del. R.Crim.P. 29 ..... 9

Hawaii R.Penal P. 29 ..... 10

Ill. Ann. Stat. Ch. 725, Act 5, T. VI, Art. 115.4(k) ..... 10

Iowa R.Crim.P. 2.19(8) ..... 9



## TABLE OF AUTHORITIES – Continued

Page

La. C.Cr.P., art. 778 ..... 9

Mass. R.Crim.P. 25 ..... 10

Mich. R.Crim.P. 6.419 ..... 10

Minn. R.Crim.P. 26.03(17) ..... 10

N.C. St. § 15A-1227 ..... 10

N.J. R.Crim.P. 3:18-1 ..... 10

N.M. R.Crim.P. 5-607(E) ..... 9

N.Y. Crim. Proc. Laws § 290.10 ..... 9

Ohio R.Crim.P. 29 ..... 10

Okla. St. § 850 ..... 9

Utah Code Ann. § 77-17-3 ..... 10

W.Va. R.Crim.P. 29 ..... 9

## STATEMENT OF *AMICI CURIAE* INTEREST

Idaho, and the 21 other states that join in this brief, urge the Court to affirm the holding of the Massachusetts Appeals Court in *Commonwealth v. Smith*, 788 N.E.2d 977 (Mass. App. 2003). The states have an interest in a full and fair opportunity to have their charges against criminal defendants fully litigated and decided by a jury or a trier of fact. Idaho and the states joining this brief believe that interest is best served by a double jeopardy legal standard that allows a trial judge to reconsider a mid-trial ruling that the evidence presented is insufficient prior to the termination of the trial proceedings.

## SUMMARY OF THE ARGUMENT

The Petitioner, Melvin T. Smith, requests this Court to hold that the trial court's ruling on his mid-trial motion was an acquittal for purposes of the Double Jeopardy Clause, which, he argues, precludes any sort of review or reconsideration, even by the trial judge prior to discharge of the jury. The Respondent, the Commonwealth of Massachusetts, requests this Court to hold that the trial court's mid-trial ruling on the sufficiency of the evidence was not an acquittal for purposes of application of the Double Jeopardy Clause. The *amici* states concur in the argument of the Respondent. The *amici* states, however, further respectfully submit that, even if a mid-trial ruling that the evidence is insufficient is considered an acquittal, such acquittal alone does not terminate jeopardy. Rather, the ruling on the sufficiency of the evidence coupled with the release of the jury from its oath to determine the charge (or termination of the bench trial) is what ends jeopardy, and thus a trial court does not offend the Double Jeopardy Clause by

reconsidering, prior to ending the trial itself, its legal ruling that the evidence is insufficient.

The primary evil the Double Jeopardy Clause guards against by not allowing a challenge to an acquittal is repeated attempts by the government to convict. The State has a legitimate interest in having a full and fair opportunity to prove its case to the jury. Allowing a judge to reconsider, prior to dismissal of the jury empanelled to hear the charge, an erroneous ruling that the prosecution has not presented sufficient evidence to prove the merits of the charge protects all of the rights of the defendant, avoids the primary evil of creating the need for a second trial, and protects the governmental interest in having a full and fair opportunity to present its case.

## ARGUMENT

### I.

### The Double Jeopardy Clause is not Offended where a Trial Court Reconsiders an Erroneous Ruling that the Evidence is Insufficient Prior to Terminating the Trial Itself

This Court's opinions interpreting the protection of the Double Jeopardy Clause "establish that the primary evil to be guarded against is successive prosecutions: '[t]he prohibition against multiple trials is the controlling constitutional principle.'" *Schiro v. Farley*, 510 U.S. 222, 230 (1994) (brackets original) (quoting *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980)). The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). An acquittal is generally deemed



to "terminate the initial jeopardy," so that "subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986). That Clause, however, is "not offended" if there is no threat of "successive prosecutions." *United States v. Wilson*, 420 U.S. 332, 344 (1975).

Given this state of the law, it is hardly surprising that the parties to this appeal have focused their arguments upon whether the actions of the trial court constitute an "acquittal" for purposes of the Double Jeopardy Clause. The *amici* states in this brief, however, respectfully suggest that, even if the initial ruling of the trial court is deemed an acquittal, reconsidering and ultimately allowing the disputed charge to go to the jury did not violate the Double Jeopardy Clause because such was entirely consistent with the history and policy behind the Clause.

This Court addressed the policy and history of the Double Jeopardy Clause in *United States v. Wilson*, 420 U.S. 332 (1975), where the question was whether a governmental appeal of a judgment of acquittal following a jury verdict of conviction was permitted by the Double Jeopardy Clause. In that case this Court noted that the genesis of the right against double jeopardy arose out of the three common-law pleas of *autrefois acquit*, *autrefois convict* and pardon, which could be raised "to bar the second trial of a defendant. . . ." *Id.* at 339-42. "It was only when the defendant was indicted for a second time after either conviction or an acquittal that he could seek the protection of the common-law pleas." *Id.* at 342. This historical background, concluded the Court, "suggests" that the Double Jeopardy Clause "was directed at the threat of multiple prosecutions, not at Government

appeals, at least where those appeals would not require a new trial." *Id.*

The Court also found this history reflected in cases interpreting the double jeopardy protections against "second prosecution" or "multiple trials." *Id.* at 342-43. "By contrast, where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." *Id.* at 344. Thus, "a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *Id.* at 345.

Finally, the Court determined that allowing government appeals of acquittals would infringe upon the rights protected by the Double Jeopardy Clause because it "would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal." *Id.* at 352. Allowing appeals of post-verdict legal rulings, however, "would not grant the prosecutor a new trial or subject the defendant to the harassment traditionally associated with multiple prosecutions." *Id.*

Although the Court in *Wilson* was talking about the government appealing an order of acquittal entered after a guilty verdict, its analysis applies equally well to whether the government can request a trial judge to reconsider a ruling that the evidence was insufficient prior to any actual or constructive termination of the trial itself. Just like with governmental appeals, a trial judge reconsidering an



erroneous ruling on the adequacy of evidence prior to the termination of the trial will not result in a second prosecution or multiple trials; the prosecution being able to seek to persuade a second trier of fact of guilt after failing with the first; or the prosecution re-examining weaknesses in the first presentation of evidence to strengthen a second presentation.

Because the history of and the policy behind the Double Jeopardy Clause show its purpose is to prevent second prosecutions and multiple trials, the Clause is not offended by the prosecution asking for, or the judge undertaking, reconsideration of an erroneous legal conclusion that the evidence is insufficient to support the charge where granting that request will merely mean continuation of a trial already in progress. Where the trier of fact is available to determine guilt or its absence in the course of a single proceeding, reconsideration of a determination on the sufficiency of the evidence does not lead to the risk of a second trial. Therefore, holding that initial jeopardy does not terminate until there has been both an acquittal and an end to the trial best promotes the historical and policy underpinnings of the Double Jeopardy Clause.

That jeopardy does not terminate until there has been both an acquittal and an end of trial proceedings is also consistent with the double jeopardy precedent of this Court. For example, in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the jury was discharged after being deadlocked and thereafter the trial judge entered an order of acquittal. Thus, in *Martin Linen* there had been both an acquittal and a termination of the trial in the discharge of the jury following a mistrial. In finding that a governmental appeal of the acquittal violated the Double Jeopardy Clause the Court reiterated that the

"'controlling constitutional principle' focuses on prohibitions against multiple trials." *Id.* at 569 (quoting *United States v. Wilson*, 420 U.S. 332, 346 (1975)). This prohibition "rests upon two threshold conditions": that the Clause only applies where the defendant has been placed in jeopardy, and jeopardy attaches when a jury is empanelled and sworn or evidence is presented in a bench trial. *Martin Linen*, at 569. Furthermore, this Court concluded that the timing of the acquittal in relation to the discharge of the jury was not constitutionally significant, *id.* at 573-74, suggesting that the discharge of the jury itself was significant to the conclusion that allowing a state appeal of the acquittal violated double jeopardy protections.

Because this Court's cases have dealt primarily with whether a government appeal and remand thereafter would constitute a second jeopardy, this Court has never squarely addressed whether an end to the trial is a necessary predicate to the termination of the initial jeopardy. Perhaps the closest this Court has come to this question was in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), relied upon heavily by Petitioner in this case. The Smalises underwent a bench trial on a variety of charges related to a suspected arson. The trial court ruled at the close of the state's case, as "the trier of fact and law," that the evidence was not sufficient to sustain convictions in relation to some of the charges. *Id.* at 141-42. This Court held that this ruling constituted an acquittal barring further proceedings. *Id.* at 144.

In addressing Pennsylvania's argument that resumption of the bench trial would "simply constitute 'continuing jeopardy,'" the Court stated that "subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy



Clause." *Id.* at 145 (citing *Arizona v. Rumsey*, 467 U.S. 203, 211-12 (1984)). Allowing an appeal that would lead to such disallowed proceedings therefore "would frustrate the interest of the accused in having an end to the proceedings against him." *Id.* Thus, "the Double Jeopardy Clause bars a post acquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.'" *Id.* at 145-46 (quoting *Martin Linen*, 430 U.S. at 570).

This Court's stated prohibition against "further proceedings" after a successful appeal of an acquittal is not a bar to continuing the same proceeding after reconsideration by the trial judge of her ruling that the evidence was insufficient. Unlike the situations in *Martin Linen*, 430 U.S. at 570 (where the "further proceedings" would have been a new trial after appeal and remand), *Rumsey*, 467 U.S. at 211-12 (where the "further proceedings" would have been a new sentencing hearing regarding application of the death penalty after appeal and remand), and *Smalis*, 476 U.S. at 145-46 (where the "further proceedings" would have been at least a resumption of trial after appeal and remand, years after the trial court's grant of demurrer), there is only one "proceeding" – beginning at the empanelling and swearing of the jury or the presentation of evidence in a bench trial and ending with a verdict of guilty or not guilty – where a judge rules the evidence insufficient at mid-trial but reconsiders and either submits the charge to a jury never released from its charge, or renders a verdict on the merits having never terminated the trial.

Allowing the trial court to reconsider an erroneous ruling on the sufficiency of the evidence is also justified by public interest. In contrast with the primary evil guarded against by the Double Jeopardy Clause, "the public" has a "valued right to 'one complete opportunity to convict those who have violated its laws.'" *United States v. Scott*, 437 U.S. 82, 100 (1978) (quoting *Arizona v. Washington*, 434 U.S. 497, 509 (1978)); *see also Richardson v. United States*, 468 U.S. 317, 325 (1984) ("The Government, like the defendant, is entitled to resolution of the case by verdict from the jury. . . ."). Where there has "been none of the governmental overreaching that double jeopardy is supposed to prevent" prematurely ending the prosecution "would deny the State its right to one full and fair opportunity to convict those that have violated its laws." *Ohio v. Johnson*, 467 U.S. 493, 502 (1984). Allowing one complete proceeding – a trial – promotes this "valued right." Reconsideration, before the trial has ended, of an erroneous ruling that the evidence is insufficient for conviction is not governmental overreaching prevented by the Double Jeopardy Clause. Unlike situations where the trial has ended and appeals have been pursued for years, allowing the trial court to reconsider its ruling prior to the formal or informal termination of the trial allows the public a complete opportunity to prove its charge without requiring the defendant to defend against the charge more than once.

Even if an erroneous conclusion that the evidence is insufficient is deemed an acquittal, allowing the judge to reconsider that ruling *in the course of the same trial* is consistent with sparing a defendant from the primary evil of successive prosecutions and with the history of the Double Jeopardy Clause. Such does not lead to "further



proceedings" to determine guilt, as would allowing an appeal or a new trial. Allowing such reconsideration also balances the public interest in having a criminal charge determined in a single proceeding. The undersigned *amici* states therefore respectfully request this Court to hold that, even if a trial court's ruling on the sufficiency of evidence be deemed an acquittal, reconsideration of that ruling prior to the termination of the trial does not offend the Double Jeopardy Clause.

## II.

## Allowing Reconsideration of Erroneous Rulings on the Sufficiency of the Evidence Before the Termination of Trial Will Promote Uniformity of Application of Double Jeopardy Principles Among States with Different Procedural Rules

State procedures on defense challenges to the sufficiency of the state's evidence vary widely. *Compare* N.M. R.Crim.P. 5-607(E) (requiring judicial determination of sufficiency of evidence at close of presentation of evidence by prosecution in every case) *with* La. C.Cr.P., art. 778 (not allowing any pre-verdict judicial review of sufficiency of evidence) *and* Okla. St. § 850 (trial judge may recommend verdict of acquittal but may not prevent jury from reaching a verdict). The vast majority of states specifically allow a defendant to challenge the sufficiency of the state's evidence at the close of the prosecution's case. Of these, several specifically provide that the trial court may reserve ruling on the motion until after the jury has returned a verdict. *See, e.g.*, Alaska R.Crim.P. 29; Del. R.Crim.P. 29; Iowa R.Crim.P. 2.19(8); N.Y. Crim. Proc. Laws § 290.10; W.Va. R.Crim.P. 29. Many (including Massachusetts), however, require the court to rule on the

motion before continuing the trial. *See, e.g.,* Alabama R.Crim.P. 20.2; Arizona R.Crim.P. 20; Colorado R.Crim.P. 29; Hawaii R.Penal P. 29; Ill. Ann. Stat. Ch. 725, Act 5, T. VI, Art. 115.4(k); Mass. R.Crim.P. 25; Mich. R.Crim.P. 6.419; Minn. R.Crim.P. 26.03(17); N.J. R.Crim.P. 3:18-1; N.C. St. § 15A-1227; Ohio R.Crim.P. 29; Utah Code Ann. § 77-17-3.

These differing procedures reflect different weighing of competing interests. Some states follow the federal model of Federal Criminal Rule 29 and emphasize the jury's role and allow a judge with doubt as to the propriety of finding the government's evidence insufficient to defer a ruling until after the jury has rendered a verdict. Others, like Massachusetts, favor a policy of granting a criminal defendant an immediate ruling on his motion, possibly sparing him from having to endure the rest of a trial in which the government cannot legally prevail. *See, e.g.,* Comment to Arizona R.Crim.P. 20 (defendant should not be forced to decide to present evidence on his behalf in ignorance of the sufficiency of state's case). One of the drawbacks to the latter procedure, however, is that it increases the likelihood of error. Judges unwilling to delay trials will necessarily make rulings without the benefit of delay that might be necessary or appropriate to reflect on the evidence or do legal research on the standards by which the jury might weigh the evidence. Preventing all reconsideration of erroneous rulings would therefore have the effect of creating a greater burden upon states that have elected to afford their criminal defendants with immediate rulings on mid-trial motions challenging the sufficiency of the evidence against them.

If this court should adopt the Petitioner's view of the Double Jeopardy Clause and hold that no erroneous ruling



on the sufficiency of the evidence may be reconsidered in the course of the trial, the number of criminal defendants erroneously placed beyond the state's ability to try will increase. More error is likely in such states where trial judges do not have the luxury of delaying a ruling in order to do necessary legal research. This will increase the cost to states that have made the policy determination that defendants should be spared the burden of finishing a trial where the trial judge determines the evidence to be insufficient, and will result in a lack of uniformity in application of double jeopardy principles among states.

On the contrary, allowing a trial judge to reconsider an erroneous ruling prior to the termination of the trial itself will result in fewer cases settled on less than the merits of the charges. Such a rule applies easily to the procedures applied by the various states and will not increase the societal cost to those states that do not allow a trial judge to postpone a ruling on the sufficiency of the evidence until after a verdict is rendered. Even in those states that allow reservation of a ruling, courts will feel less compelled to reserve a ruling they know will not be immediately beyond their ability to correct if they are in error.

Because of the policy issues implicated in the issue presented in this case, and the merits as set forth above, the undersigned *amici* states respectfully request this Court to hold that, even if a trial court's ruling on the sufficiency of evidence be deemed an acquittal, reconsideration of that ruling prior to the termination of the trial does not offend the Double Jeopardy Clause.

## CONCLUSION

The amici respectfully requests this Court to affirm the judgment of the Appeals Court of Massachusetts.

Respectfully submitted.

LAWRENCE G. WASDEN
Idaho Attorney General

KENNETH K. JORGENSEN*
LORI A. FLEMING
JESSICA M. BORUP
Deputy Idaho Attorneys General

P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

**Counsel of Record*

Supreme Court, U.S.
FILED
SEP 10 2004
OFFICE OF THE CLERK

No. 03-8661

# In the Supreme Court of the United States

MELVIN T. SMITH,

*Petitioner,*

v.

COMMONWEALTH OF MASSACHUSETTS,

*Respondent.*

**On Writ of Certiorari to the Appeals Court of the Commonwealth of Massachusetts**

## BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

*Of Counsel:*
PAMELA HARRIS
*Co-chair, Amicus Committee*
*National Association of Criminal Defense Lawyers*
*1625 I Street, N.W., 10th Fl.*
*Washington, D.C. 20006*
*(202) 383-5386*

ANDREW H. SCHAPIRO
*Counsel of Record*
SCOTT A. CHESIN
*Mayer, Brown, Rowe & Maw LLP*
*1675 Broadway*
*New York, N.Y. 10019*
*(212) 506-2500*

*Counsel for Amicus Curiae*

## TABLE OF CONTENTS

INTEREST OF THE AMICUS CURIAE ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 3

I. THE MASSACHUSETTS RULE MAKES NO SENSE AND LEADS TO ABSURD RESULTS ..... 3

A. The Judge/Jury Anomaly ..... 3

B. The Multiple Count Anomaly ..... 4

C. The Multiple-Defendant Anomaly ..... 5

II. THE RULE PROPOUNDED BY THE COURT OF APPEALS IS INCONSISTENT WITH THE WISE AND WELL ESTABLISHED MAXIM THAT THE GOVERNMENT BE AFFORDED ONLY "ONE BITE AT THE APPLE" WHEN SEEKING TO CONVICT A PERSON OF A CRIME ..... 7

CONCLUSION ..... 9

## TABLE OF AUTHORITIES

**Page(s)**

### CASES

*Arizona* v. *Rumsey*,
467 U.S. 203 (1984) .....4

*Burks* v. *United States*,
437 U.S. 1 (1978).....8

*Commonwealth* v. *Smith*,
58 Mass. App. Ct. 166, 788 N.E.2d 977 (2003) .....2, 5

*Fong Foo* v. *United States*,
369 U.S. 141 (1962) .....4

*Grady* v. *Corbin*,
495 U.S. 508 (1990) .....8

*Green* v. *United States*,
355 U.S. 184 (1957) .....8, 9

*Hudson* v. *Louisiana*,
450 U.S. 40 (1981).....4

*Lockhart* v. *Nelson*,
488 U.S. 33 (U.S., 1988) .....8

*Price* v. *Vincent*,
538 U.S. 634 (2003) .....6

*Price* v. *Vincent*,
2003 WL 1989564, 71 U.S.L.W. 3695, 16 Fla. L. Weekly
Fed. S 281 (Oral Argument) (U.S. Apr 21, 2003) .....6



## TABLE OF AUTHORITIES – continued

**Page(s)**

*Sanabria* v. *United States*,
437 U.S. 54 (1978).....4

*Smalis* v. *Pennsylvania*,
476 U.S. 140 (1986) .....4

*Tibbs* v. *Florida*,
457 U.S. 31 (1982).....8, 9

*United States* v. *DiFrancesco*,
449 U.S. 117 (1980) .....8

*United States* v. *Dixon*,
509 U.S. 688 (1993) .....8

*United States* v. *Martin Linen Supply Co.*,
430 U.S. 564 (1977) .....4

### MISCELLANEOUS

Ronald J. Allen, William J. Stuntz, Joseph L. Hoffmann, &
Debra A. Livingston, Comprehensive Criminal Procedure
1353 (2001).....8

## BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

---

### INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliation organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. Few protections are more basic and more essential to criminal defendants than the guarantee that an accused will not be tried more than once for the same offense; it is of vital interest to NACDL's membership that the protection against double jeopardy remain intact and vigorous.

---

[1] Pursuant to Rule 37.6, the *amicus* certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, or its counsel have made a monetary contribution to this brief's preparation or submission.

Letters from the parties consenting to the filing of this *amicus* brief have been lodged with the Clerk of the Court.

## INTRODUCTION AND SUMMARY OF ARGUMENT

After the prosecution rested its case in Petitioner's trial for unlawful possession of a firearm, assault and battery with a dangerous weapon, and armed assault with intent to murder, the trial judge granted Petitioner's motion for acquittal on the firearms charge, stating on the record that the Government had produced "not a scintilla of evidence" to satisfy one of the statutory elements of the offense. The acquittal was then recorded on the docket; the defendant and his co-defendant put on their cases; and a charge conference was held. But after a recess, the prosecution presented additional authority and argument to the judge on the firearms charge, and the judge revoked her acquittal. The jury was permitted to consider the disputed count, and convicted on it.

The Appeals Court held that "double jeopardy protections were not violated in these circumstances because the judge's correction of her ruling did not require a second proceeding" and did not subject Petitioner "'to a second trial before a second trier of fact.'" 788 N.E.2d at 982. This holding, if allowed to stand, would represent a dangerous erosion of the protections of the Double Jeopardy Clause, for two reasons.

First, the rule promulgated by the Massachusetts court — that the Double Jeopardy Clause is not violated by a reversed acquittal so long as there is no "second trial before a second trier of fact" — would, if consistently applied, eviscerate the protections of the Clause by conditioning its availability on irrelevant factors outside the control of either the court or the defendant.

Second, the holding of the Appeals Court deals a blow to the core principle that underlies the protection against double



jeopardy: that the government cannot be permitted, after it has failed to convince a court of a defendant's guilt, to return a second time with a ***new, refined argument***, and try again. As this Court has explained multiple times in various contexts, allowing the government more than one opportunity to test out theories and arguments is fundamentally unfair and poses a significant risk that even an innocent defendant will eventually be convicted.

## ARGUMENT

### I. THE MASSACHUSETTS RULE MAKES NO SENSE AND LEADS TO ABSURD RESULTS.

The Petitioner rightly argues that the rule promulgated by the Appeals Court — that the Double Jeopardy Clause is violated only when a defendant is subjected to a "second proceeding" in front of a "second trier of fact" — is at odds with this Court's well settled constitutional precedent. Even if that were not the case, however, it would be clear that the Massachusetts rule — and the regime that it would produce — is unfair, unworkable, and subject to irrational inconsistencies.

Under the rule espoused by the Appeals Court, the happenstance of procedural posture controls the availability of the protection against double jeopardy. The continuing availability of a single factfinder in a single proceeding cannot be the touchstone of double jeopardy analysis; if it were, a host of irrelevant factors would determine dispositively whether a defendant's double jeopardy rights have been violated.

#### A. The Judge/Jury Anomaly

The Appeals Court's rule establishes an irrational distinction between judges and juries. Our Constitution would not allow a jury that has acquitted a defendant to return to the courtroom the following day and recant its verdict, even if

the recantation were based on jurors having learned that a legal instruction had been misinterpreted in the jury room.

That prospect is not purely hypothetical. Imagine a bifurcated criminal trial in which the jury acquits the defendant on one charge but convicts on a second. During the sentencing phase, the jury hears evidence that demonstrates to its satisfaction that the acquittal on the first charge was error. The jury cannot be permitted to reverse its acquittal in such circumstances.

But that scenario is functionally identical to what happened here. In both cases, a single factfinder, in a single proceeding, hears evidence and reaches a verdict. In both cases, a verdict of acquittal is reversed upon the decisionmaker's subsequent conclusion that a point of law has been misunderstood. According to the Appeals Court, the Double Jeopardy Clause permits retrial here, even though it could not in the case in which a jury makes a decision and then reverses itself.

One consequence of the Massachusetts rule, then, is that an acquittal is treated differently, for purposes of the Double Jeopardy Clause, if it comes from a judge than if it comes from a jury. But the settled caselaw says otherwise: There is "no 'legal distinction' between judge and jury with respect to the invocation of the protections of the double jeopardy clause." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977); see also *Smalis* v. *Pennsylvania*, 476 U.S. 140, 145 (1986); *Arizona* v. *Rumsey*, 467 U.S. 203, 210-12 (1984); *Hudson* v. *Louisiana*, 450 U.S. 40, 44-45 & n.5 (1981); *Sanabria* v. *United States*, 437 U.S. 54, 64 & n.18 (1978); *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962).

### B. The Multiple Count Anomaly

The bifurcated-trial scenario highlights a second difficulty in applying the Appeals Court's rule. While one might strain to distinguish Mr. Smith's case from that of the defendant whose jury returns to the courthouse uninvited the following morning bent on conviction, the comparison is even closer when the jury remains impaneled for some reason after voting to acquit.



According to the Appeals Court, Mr. Smith was not "otherwise prejudiced" by the judge's reversal of the directed verdict because "[t]he jury were not aware that the judge had allowed the motion and the correction of the ruling was made before closing arguments." *Commonwealth* v. *Smith*, 58 Mass. App. Ct. 166, 171, 788 N.E.2d 977, 983 (2003). Presumably, had the jury learned of the directed verdict, jeopardy would have terminated. Certainly, had the jury been discharged following the judge's ruling, subsequent reversal would have been barred.

The problem is this: Mr. Smith's jury was not informed of the directed verdict ***only because*** other charges remained pending against him. For that reason only, the trial continued and the jury remained impaneled and unaware of the ruling. Under the rule of the Appeals Court, then, jeopardy terminates upon a judgment of acquittal for a defendant facing only one charge, but jeopardy continues for a defendant acquitted of an identical offense on identical grounds until the resolution of other, perhaps unrelated charges. The finality of the judge's ruling for Double Jeopardy purposes varies based on whether the judge has granted a full or a partial acquittal. There is no constitutional basis for importing such absurdities into the Double Jeopardy Clause, or for such disparate treatment of such similar defendants.

### C. The Multiple-Defendant Anomaly

The Appeals Court's rule would also allow conviction of a fully acquitted defendant whose co-defendants remain on trial. If the Double Jeopardy Clause is not violated by the reconsideration of an acquittal, as long as a single proceeding continues with a single fact-finder, it would appear that a defendant who has been acquitted of all charges — and sent

home — could nonetheless be recalled and subsequently convicted, at least if the jury remains unaware of his temporary absence.

This anomaly was discussed during the oral argument in this Court's consideration, last term, of *Price* v. *Vincent*, 538 U.S. 634 (2003). Responding to the espousal, by the United States (as *amicus* in *Price*) of a rule nearly indistinguishable from the Massachusetts decision at issue here, one Justice of this Court asked the following question:

> What – what if you have a series of defendants in a – in a case and it's being tried, and at the close of the prosecution's evidence, the judge dismisses the indictment against one of the defendants, but keeps on so the jury is still there?

*Price* v. *Vincent*, 2003 WL 1989564, at *24, 71 U.S.L.W. 3695, 16 Fla. L. Weekly Fed. S 281 (Oral Argument) (U.S. Apr 21, 2003), Oral Argument, (No. 02-524). The United States responded to this question by arguing that the Court could decide whether "there's constructively or through legal fiction the discharge of the jury with respect to that defendant even though the actual jury is still there." *Id.* at *25.

The inquiring Justice did not appear receptive to the Government's constructive discharge theory ("That's an extraordinary doctrine." *Id.* at *25), and for good reason: Finding a constructive discharge with respect to one defendant would highlight the difficulty inherent in the Massachusetts rule. If a full acquittal of one defendant constitutes "constructive" discharge of the jury with respect to that defendant, why does a finding of acquittal on one ***charge*** not require "constructive" discharge of the jury with respect to that charge?

Neither the Massachusetts Appeals Court, the respondent in *Price*, nor the United States as *amicus* in that case, has offered any better suggestion for avoiding the problem created by partial acquittals. Thus, if this Court were to adopt the position advocated below (and in *Price*), a judge who grants



a motion for acquittal on all counts against all defendants renders a final verdict that bars further proceedings. However, if one defendant is completely acquitted and another is not, the trial proceeds, and the judge may, at any point before closing argument, reverse her decision and require the acquitted defendant once again to stand trial. It is incumbent upon the Respondent here to offer some theory that would explain how the protection of the Double Jeopardy Clause can vary depending on whether other defendants are being tried by the same jury.

## II. THE RULE PROPOUNDED BY THE COURT OF APPEALS IS INCONSISTENT WITH THE WISE AND WELL ESTABLISHED MAXIM THAT THE GOVERNMENT BE AFFORDED ONLY "ONE BITE AT THE APPLE" WHEN SEEKING TO CONVICT A PERSON OF A CRIME.

One could attempt to portray Mr. Smith's case as unremarkable and outside the core protections of the Double Jeopardy Clause. After all, the judge's decision to reverse her ruling occurred before the jury heard closing argument and before any deliberation. At least according to the Appeals Court, Mr. Smith was not "otherwise prejudiced" by the reversal of the directed verdict.

But this is not a situation of "no harm, no foul." Mr. Smith's trial implicates the very core values of the Double Jeopardy Clause for a simple reason: The judge reconsidered her ruling only after the prosecution, having failed once to convince her of its position, returned a ***second*** time to make a ***second*** argument. To be sure, it is the position of this *amicus* that even a *sua sponte* reversal of the directed verdict would violate the Double Jeopardy Clause. But a reversal based on the government's unsolicited invitation to consider new and refined arguments is the very essence of a double jeopardy violation.

"[T]he underlying reason for prohibiting successive trials is to prevent the government from gaining the advantage of a test run during which it can test the strength of its own and the defendant's evidence, followed by 'another opportunity to supply evidence which it failed to muster in the first proceeding.'" RONALD J. ALLEN, WILLIAM J. STUNTZ, JOSEPH L. HOFFMANN, & DEBRA A. LIVINGSTON, COMPREHENSIVE CRIMINAL PROCEDURE 1353 (2001) (quoting *Burks* v. *United States*, 437 U.S. 1, 11 (1978)). Indeed, this prohibition against giving the government a second bite at the apple has repeatedly been characterized by this Court has "lying at the core of the Clause's protections," because it "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction." *Tibbs* v. *Florida*, 457 U.S. 31, 42 (1982) (citing *Green* v. *United States*, 355 U.S. 184, 187-188 (1957); *United States* v. *DiFrancesco*, 449 U.S. 117, 130 (1980)).[1] This case thus presents a paradigmatic example of the type of danger against which the Double Jeopardy Clause was designed to protect.

The respondent can be expected to argue the slippery slope: A ruling by this Court in the petitioner's favor will allow defendants to take advantage of interlocutory misstatements — obvious errors of law, easily and quickly correctible — to engineer acquittals despite guilt. But that farfetched possibility is certainly not what happened here,

[1] See also, e.g., *United States v. Dixon*, 509 U.S. 688, 736 (1993) (Rehnquist, C.J., dissenting) (including "preventing the Government from gradually fine-tuning its strategy" as one principle justifying the protection against double jeopardy); *Grady v. Corbin*, 495 U.S. 508, 518 (1990) ("Multiple prosecutions also give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged."); *Lockhart v. Nelson*, 488 U.S. 33, 44 (U.S., 1988) (Marshall, J., dissenting) (State's "honing its trial strategies and perfecting its evidence through successive attempts at conviction" is a "classic double jeopardy evil").



where the judge made a considered decision and then reversed it only after renewed argument from the prosecution. And in any event the dangers of the rule espoused below plainly are far more ominous. The government must not be permitted to refine and re-fashion its theory of the defendant's guilt until it discovers one that works. As this Court has repeatedly cautioned, "[r]epeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." *Tibbs*, 457 U.S. at 41. Indeed, it is fundamental that

> the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

*Green* v. *United States*, 355 U.S. 184, 187-88 (1957). The rule adopted by the court below thus cannot be squared with the most basic concerns that animate the Double Jeopardy Clause.

## CONCLUSION

The judgment of the Appeals Court should be reversed.

Respectfully submitted.

*Of Counsel:*
PAMELA HARRIS
*Co-chair, Amicus Committee*
*National Association of*
*Criminal Defense Lawyers*
*1625 I Street, N.W., 10th Fl.*
*Washington, D.C. 20006*
*(202) 383-5386*

ANDREW H. SCHAPIRO
*Counsel of Record*
SCOTT A. CHESIN
*Mayer, Brown, Rowe & Maw LLP*
*1675 Broadway*
*New York, N.Y. 10019*
*(212) 506-2500*

SEPTEMBER 2004